# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1966

## No. 18

UTAH PIE COMPANY, PETITIONER,

*vs.*

CONTINENTAL BAKING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 911] Voir dire examination.

By Mr. Alioto:

Q. Tell me again what the green is.

A. The green represents fresh pie sales.

Q. The green are fresh pie sales?

A. And other income, all the other forms of income other than frozen pies.

Q. So that the yellow, then, are the frozen pies?

A. That is right.

Mr. Alioto: We have no objection, if your Honor please.

The Court: Received.

(The exhibit marked Defendant's Exhibit A-48 for identification was received in evidence.)

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[fol. 912] Q. Will you please tell the jury what an operating statement is.

A. That is where we computed the net income of the company as though it were only in the frozen pie business, eliminating that capital gain feature that was not relevant to the frozen pie business. And in the year 1961 the rate of return was 30.6 per cent. In the year 1960, it was 17.3 per cent. In the year 1959 the company earned 27.8 per cent of its net worth. And in the years 1958 and 1957 there was no return, since there was a small loss in '58 and another loss in '57.

[fol. 913] Q. Now, these calculations have nothing to do with salaries?

A. That's—

Q. These calculations have nothing to do with salaries?

A. Well, the net income was adjusted, where we computed the operating income, we have added back an amount to income where the bonuses exceeded ten per cent of the basic salaries. So to that extent, they do have a bearing on salary.

• • • • • • •

Mr. Lamb: We have an exhibit here, A-49, which is a transparency that will compare the Swiss Miss and apple pie for northern California and Reno as against the Utah Pie price.

Mr. Alioto: The Utah price for your company, or—

• • • • • • • •

Mr. Alioto: And is it stipulated that this exhibit is taken from what source? Invoices?

Mr. Lamb: No, these exhibits have been taken from the price list, the off-invoice, and the advertising allowances. What we introduced this morning was the additional information of invoices. In order to make the record absolutely clear—

Mr. Alioto: These exhibits, then purport to be only what is taken from the price lists, and do not represent any advertising allowance that may have been paid back by check; is that right?

[fol. 914] Mr. Lamb: No, no. These represent the exact price, with all invoice allowances on the announcements and all advertising allowances on the announcements. In other words, if a Swiss Miss pie was purchased at that time, it would have been purchased at that price.

Mr. Alioto: Well, then, let me put it this way. May we stipulate that these represent your offering prices, rather than prices actually paid by the wholesaler?

Mr. Lamb: That's right.

• • • • • • • •

(The exhibit marked Defendant Pet's Exhibit No. A-49 for identification was received in evidence.)

[fol. 915] Mr. Billings: Now, your Honor, I have a similar exhibit, which is Carnation's Exhibit C-G through C-N, which was prepared by Mr. Zimmerman in the same manner; and I wonder if we could have the same stipulation, so we won't have to call Mr. Zimmerman back?

Mr. Alioto: These, again, are offering prices, rather than prices paid by wholesalers?

Mr. Billings: I don't know whether there's any difference; but they were taken from the offering sources.

Mr. Alioto: Okay. They were not taken from sources showing anything actually paid by a wholesaler?

Mr. Billings: That's correct.

Mr. Alioto: On that basis, our objection, again, is to weight, not to admissibility.

The Court: All right. Received in evidence.

(The exhibit marked Defendant Carnation's Exhibit No. C-G through C-N for identification was received in evidence.)

Mr. Lamb: Your Honor, we have no further questions of this witness.

Cross examination.

By Mr. Alioto:

Q. Mr. Zimmerman, the very last testimony you gave related to the per cent of earnings to net worth. Was that it?

A. Yes, sir.

Q. Would you be good enough to find the exact page that thats' set out in your Exhibit A-46?

(Witness indicates.)

Q. Now, did I correctly understand you to say that in that connection that this is the rate of return—that is, the rate of earnings to net worth—based upon income as adjusted by you, rather than income as shown by the books?

A. Yes, sir.

Q. Now, in connection with that income adjustment, did I further understand you, did I correctly understand you to say that you took some of the salaries paid to the Rigbys in consideration and showed that as earnings of the corporation?

[fol. 916] A. We reduced the salaries by approximately, in the year 1961, by twelve or thirteen thousand dollars,

and considered that to be part of the return on the net worth of the company.

Q. Why did you reduce the salaries, Mr. Zimmerman? Didn't you figure that these folks were worth it?

A. This was discussed, and the position we took was that a normal Christmas bonus would amount to, at best, one month's salary; and this ten per cent is even more than that. The bonuses appeared to me, based up on the net income as reported by the company, to have a rather direct relationship to the net earnings of the company for Federal Income Tax purposes. And for that reason it seemed fairer, in order to reflect a truer rate of return, for the company to adjust their bonuses.

The Court: I don't understand that.

By Mr. Alioto:

Q. Isn't the substance of what you have said that these people weren't worth the salaries they received? Now, isn't that the substance of what you have said?

A. Absolutely—

Mr. Lamb: I object to that. That's a characterization.

Mr. Alioto: Isn't the—

The Court: Overruled.

The Witness: No, sir, it is not.

By Mr. Alioto:

Q. What you're saying is, in effect, that the salaries are unreasonable?

A. No, sir, I am not.

The Court: Now, what did you mean by "had a direct relationship to the earnings of the company for Federal Income Tax purposes?" I don't understand that.

The Witness: Well, your Honor, as the earnings of the company before bonuses increased, the amount of the bonuses increased, as well. And—

The Court: Well, sure. When they make more money, they get more bonus.

The Witness: Yes, sir. But at the same time, your Honor, the increases were to all members of the family, [fol. 917] regardless of their tenure with the company. And they did not appear to be, based upon our examination of the books and records, upon a relationship between the individual's tenure or how long he'd been with the company. And so—and it's clearly spelled out, sir, that this is one of the assumptions which exists in this study.

By Mr. Alioto:

Q. Well, is it your testimony that it's not normal to do that? Is that it?

A. It is very normal in a closely held corporation, Mr. Alioto, to adjust bonuses to Federal Tax net income.

Q. And that's what you did?

A. That's what they did, sir.

Q. Well, would you be good enough to tell me whether or not it is normal for people to work sixty hours a week, as you understand normality?

Mr. Lamb: I object to the question.

The Court: Overruled.

The Witness: Sir, who did you say was working sixty hours a week?

By Mr. Alioto:

Q. Did you make any determination before you arbitrarily decided that these folks weren't worth the salaries they gave themselves; did you make any investigation to determine—

Mr. Lamb: I object to that, your Honor.

The Court: Overruled.

By Mr. Alioto:

Q. Did you make any investigation to determine how many hours the members of this family worked in this plant?

A. As a matter of fact, sir, we were precluded from asking that type of question.

Q. So you didn't have the information?

A. I was not allowed it, sir.

Q. Now, were you here in Court when this testimony came out as to how many hours these folks worked?

A. I heard some general testimony, sir, about their working hours, but I heard nothing specifically directed to the number of hours any individual worked.

Q. Now, let's take a look at these salaries and find out which one of them you think is excessive.

A. We had a schedule, sir, showing exactly whose bonuses were adjusted in there. May I find it for you?

[fol. 918] Q. Well, now, first of all, 1957, 1, 2, 3, 4, 5, 6, 7—8 Rigby family members took $52,000. That's approximately a little more than $4,000 a year. Did you make any adjustment for that year?

A. Sir, the schedule is in there. If I may refer to it, I'd be glad to answer your question.

Q. Surely, you may refer to anything. And then just answer the question as to whether or not you made any adjustment for that year, when they took an average of $4,000 a year, these folks sitting there, and their family members.

A. Well, sir, the average is not exactly reflected. I'm sure you understand that. Bryant Rigby took $13,800 that year, and Varona Johnson, who is the daughter of the family, only took $999. But between them they did average closer to $4,000.

Q. Did you adjust that year?

A. We made no adjustment for the year 1957.

Q. All right, Now, the year 1958 shows $51,000; and 1, 2, 3, 4, 5, 6, 7—8 Rigbys worked for that year and got the

$15,000, ranging from the father—the second generation—the father of the second generation—$51,000 for eight people. Did you regard those salaries as being excessive for eight people, and therefore make an adjustment?

A. We made no adjustment in the year 1958.

Q. In 1959, according to your statement, there were 1, 2, 3, 4, 5, 6, 7—8 Rigbys who received $56,000, or an average of, let's see, that's $7,000, isn't it? An average of $7,000. Did you regard that as excessive, and therefore make an adjustment?

A. Our total adjustment amounted to $1,785.

Q. All right. Now, 1959—1960, rather—eight of the Rigbys received $59,000, a little more than $7,000 a year. Did you regard that as excessive in connection with these studies you made?

Mr. Lamb: If your Honor please, I object to this type of question, because counsel is averaging it. If he wants to give the high and low, so the jury gets a correct impression of this, I'll have no objection.

The Court: The objection is overruled.

By Mr. Alioto:

Q. Did you regard that as excessive and make an adjustment?

A. In the year 1960, the amount of our adjustment was $3,746.

[fol. 919] Q. Now, in the year 1961, eight of the Rigbys received $81,000, or an average of approximately $10,000 a year. Did you regard that as excessive and make an adjustment?

A. The amount of our adjustment was $12,552.

Q. Now, do you know that the president of the Pet Milk Company is approximately 38 years old?

A. No, sir.

Q. Do you know that the president of the Pet Milk Company is a nephew of the former president and chairman of the board?

A. No, sir.

Q. Do you know that the president of the Pet Milk Company in 1960—

Mr. Lamb: I object to this line of questions—

Mr. Alioto: —made $75,000 a year?

Mr. Lamb: Your Honor, I object to this line of questions.

The Court: The objection is overruled. I think the question is opened up.

Mr. Alioto: I gave you a chance not to open it up, too.

Mr. Lamb: I don't care about the amount being disclosed, your Honor—

The Court: The objection is overruled.

Mr. Lamb: May we argue the question—

The Court: No.

Mr. Lamb: —of the relevancy of this, in view of the—the exhibit, your Honor, that was offered here was offered on the damage question; and there's no question but what the income of the Utah Pie Company and the salaries received are relevant and material in determining whether or not there has been any injury suffered by the Utah Pie Company. In connection with what Mr. Alioto is now saying, that has no bearing on the issue of the injury in this case.

Mr. Alioto: If your Honor please, the underlying assumption of this chart, which is Plaintiff's Exhibit 47 has to be that these salaries were to some extent unreasonable, and, therefore, constitute constructive dividends, in the language of the tax statutes. If we can show that a 38-year-old nephew of the boss gets a certain amount of money for performing certain functions, I think the jury has a right to weigh that in consideration as to whether or not [fol. 920] these are reasonable for people who work 60 hours a week.

Mr. Lamb: I objected to it, your Honor.

The Court: The objection is overruled.

The Witness: Mr. Alioto—

By Mr. Alioto:

Q. The question was, did you know that Mr. Gamble, the 38-year-old president of the Pet Milk Company—

A. Mr. Alioto—

Q. —received—let me finish my question, would you?

A. I'm sorry. Pardon me.

Q. —received in 1960, $75,000 in salary and $10,000 in expense allowances?

Mr. Lamb: If your Honor please, I object to this, because this is not within the knowledge of this particular witness—

Mr. Alioto: On that objection—

Mr. Lamb: And this is testifying by Mr. Alioto.

Mr. Alioto: I'll withdraw it, and I'll offer at this time, if your Honor please, the income tax statement of the Pet Milk Company for the year 1960.

Mr. Lamb: No objection.

Mr. Alioto: In connection with the salaries of its officers.

Mr. Lamb: No objection.

The Court: Received in evidence.

(The exhibit marked Plaintiff's Exhibit No. 124 for identification was received in evidence.)

Mr. Alioto: This, ladies and gentlemen, is a schedule setting forth the compensation of the Pet Milk Company officers. Mr. Latzer, the chairman of the board, $35,000. T. R. Gamble, president, $75,600, and expense account allowance, $10,401. And Mr. S. P. Harter, of whom we've heard something, vice president, $60,000, and an expense allowance of $6,000.

• • • • • • •

[fol. 921] Mr. Lamb: I am not suggesting that it be withdrawn. The point that I wish to make, your Honor, and I want to make it clear in the record, that insofar as the salaries are concerned in relation to the issues of the lawsuit, that they're irrelevant, incompetent, and immaterial. I

have no objection to them being received. My objection goes to the question of their relevancy, materiality, and competence with regard to the proof or *disproof* of the issues of the case.

Mr. Alioto: I submit they're relevant on the question of whether or not the Rigbys' salaries are reasonable or whether or not they constitute constructive dividends. And he's opened up that question.

The Court: The objection is overruled.

[fol. 922] William N. Harsha called as a witness on behalf of defendant Pet, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Will you state your full name.

A. William N. Harsha.

[fol. 923] Q. And your address?

A. 36 Colonial Hills Drive, Creve Coeur, Missouri.

Q. And your business address?

A. 1401 Arcade Building, St. Louis, Missouri.

Q. What company do you work for?

A. Pet Milk Company.

Q. How many years have you worked for that company?

A. Approximately 22.

Q. Will you give us the relative positions that you have held with the company over that period?

A. Starting first I was a salesman in Los Angeles for approximately two years. Subsequently, three years, in the Army. Then a sales supervisor for approximately two years, a district manager, district sales manager in San Francisco for approximately five years, six years. And in 1956 I was made managing director of the Canadian Corporation, which I founded. I was head of that for a year and eight or ten months, was returned to the U.S.,

where I was made general manager of the then existing Pet-Ritz Foods Division for approximately a year. Then I was made general product manager for the corporation, the Pet Milk Corporation, which job I held for approximately a year, bringing me up to 1960. At such time I was made vice president of the corporation and assistant to the president, which job I had and held until approximately two months ago. And most recently I was made president of the Milk Products Division and retained my corporate office.

Q. In the course of your tenure since 1958 have you been intimately associated with the problems of the frozen pie business.

A. Very closely.

Q. Tell me whether or not you are familiar with the financial problems and production problems, distribution, all the problems that relate to the manufacture and distribution of frozen pies.

A. I would say I was very close to them.

Q. In your capacity as assistant to the president, what duties did you carry out for the president of the company?

A. Essentially, Mr. Lamb, my job was specific assignments on the part of the president, more specifically, you could say, working with our operating divisions, co-ordinating the activities of the operating division to most effectively utilize the corporate services that we have.

Q. Are you familiar with the date on which the Pet Milk Company entered the frozen pie business?

A. 1955, I think.

Q. At that time where was the production located?

A. The production and the management of the then existing Pet-Ritz Company was in Beulah, Michigan.

Q. Tell us what happened with regard to the expansion of the frozen pie business in 1956.

[fol. 924] A. The plant which was at Beulah, Michigan was moved to Frankfort, Michigan, which is a matter of six or seven miles, the primary reason being the Frankfort location was a part of the Crystal Canning, which was a

part of the Pet-Ritz Company that we had acquired, the reason being for economical considerations. It was to give us larger expansion and production facilities and a better labor market. That is why we moved the headquarters from Beulah to Frankfort.

Q. Did you have any other plants in 1956?

A. Not at that time, Mr. Lamb, no.

Q. When did you eventually have?

A. We acquired—I am going from memory, so bear with me, if you will. We acquired, I think, the Fresno plant in '56, if my memory serves me right. Subsequent to that we acquired a plant in Chamberburg, Pennsylvania, which was an old ice cream operation of the Hershey Ice Cream Company. That was in 1957. That then gave us three manufacturing locations.

Q. Will you give the Court and the jury some idea of what the frozen pie business was like in 1955, when the Pet Milk Company entered it?

A. Yes. It was a new and a very dynamic industry, which was developing throughout the U. S. at the close of the war, the advent of frozen foods, convenience foods, if you will. The frozen pie was a natural adjunct to convenient foods. This was new. There were very few packers at that time, relatively speaking, in the frozen fruit pie business when we acquired the Pet-Ritz operation. This was an operation that had a high degree of quality, it had a very small operation, it was a product which fit very closely into our concept of quality, high quality. This was what attracted us.

Q. How many companies were in the business at that time?

* * * * * * *

By Mr. Lamb:

Q. Take your best knowledge and belief and give us what you think.

A. I would say approximately 15 or 20 companies at the most.

Q. How many frozen pie companies are in the business today?

A. Well, it would be upwards of 200, a minimum.

[fol. 925] Q. Could you give the Court and jury your estimate of the reasons for the growth of the frozen pie business?

A Yes. It is a conven— As an industry?

I think the main reason for the growth was the convenience factor, and I think the main reason for the growth in the numbers of companies, if this is what your question is, was the ease of entry, in terms of capital investment, into the operation.

Q. At the time the Pet Milk Company first started in the frozen pie business, how many flavors of pies did Pet produce?

A. Four.

Q. Where did they, distribute them?

A. Essentially it was around the Great Lakes small area, very close and accessible to the Michigan, northern Michigan, plant. There was some spotty distribution, Mr. Lamb, but it was very spotty, beyond the confines of the Detroit-Chicago-Milwaukee area.

Q. When did it expand into other areas?

A. We promptly took the operation and expanded it over the next period of three or four or five years.

Q. Could you tell the Court and jury why the Pet Milk Company entered the frozen pie business?

A. Yes. As I initially said, this was a new industry, it was a growing industry, it was an industry at that time that attracted quality products. This fit into our concept. This was an addition, if you will, to our diversification program, to expand our corporate growth. So this was, in essence, our reason for going into the frozen pie business.

Q. Did the Pet Milk Company have any projected plans that are within your knowledge with respect to the production and promotion of frozen pies in the United States?

A. Very definitely.

Q. Well, could you tell the Court and jury what they were?

A. Well, we realized that if we were going to—after having acquired the company, that if we were to expand the distribution of this quality line, that we needed to do two things: First, we needed to expand the number of flavors to get a large range of selection to the consumer. Additionally, we realized that if we were going to expand the operation, we had to obviously expand distribution, and to expand distribution, because of the economy factor, we had to expand the number of manufacturing locations.

In the plan at that time—and it was a definite plan, whether that be manufacturing or whether that be promotional expenditures—was to add additional plants in the most geographically ideally located areas.

Q. Could you tell us what promotions did the plan include?

[fol. 926] A. Well, the plans at that time were based primarily around, first, communications, communications to the consumer, to acquaint Mrs. Consumer with the Pet-Ritz pie, its qualities, the virtues of the convenience factor. So this then included essentially advertising. This included print, newspaper and magazine. It included a high degree of use of television. It included sales promotions in the terms of in-store demonstrations, where a lady would serve—bake, serve, and acquaint the customer with the pie; couponing operation, which is a very normal operation in the food business. That, in essence, was the plan to communicate and market the product.

Q. Can you tell us from memory approximately the total expenditure on national advertising in 1957?

A. It would be in the neighborhood of a million dollars. I think if I had—

• • • • • • •

By Mr. Lamb:

Q. The national advertising budget for frozen pies in 1957 amounted to $503,921. Cooperative advertising amounted to $154,000. Commissions to brokerage, $257,000. And the total in that category, including market research, in-store demonstrations, was about $1,499,000. How much did you lose that year?

A. We didn't lose on the net figure—on the net figure was $1,040,000—let me see here. $1,040,000 was the statement's net loss.

Q. Do I take it it is your testimony, Mr. Harsha, that in 1957—

The Court: I didn't understand that. That million and what?

The Witness: A million and 40 thousand dollars net loss after taxes—before taxes, excuse me.

The Court: Before taxes?

[fol. 927] The Witness: Before taxes, I am sorry.

By Mr. Lamb:

Q. Mr. Harsha, if management had eliminated those expensive promotion expenses, what kind of a loss would you have had?

Mr. Alioto: I object on the ground it is not relevant to the subject matter and calls for an opinion and conclusion of the witness.

The Court: Sustained.

By Mr. Lamb:

Q. Mr. Harsha, was the expenditure for national advertising, the Red Skelton show, in-store demonstrations, and the like, was that part of the company's plan to gain consumer acceptance of frozen pies?

A. Very definitely.

* * * * * * *

By Mr. Lamb:

Q. Mr. Harsha, when did you return from Canada to the Pet Milk Company?

A. In September of 1958.

Q. And what was your position in September, 1958.

A. I was the general—I was appointed the general manager of the Pet-Ritz Frozen Foods.

[fol. 928] Q. Were you in charge of the expenditures for promotion?

A. Yes, I was.

Q. Did you make a study of the previous years' promotion prior to the time you came in 1958?

A. Yes, I did.

Q. Are you familiar with the expenditures in 1957, 1958 and 1959?

A. At that time I was very closely to them—very close to them.

Q. Then would you give us an approximation of how much was spent on promotion in 1957.

A. Well, in 1957—I would prefer to see the statement, but I would say it was in the neighborhood of a million dollars.

The Court: That is a matter of record.

Mr. Lamb: Excuse me, if your Honor please.

The Court: That is a matter of record.

By Mr. Lamb:

Q. How much for 1958?

The Court: As a matter of fact, the witness says he would prefer to see the statement.

* * * * * * *

By Mr. Lamb:

Q. Mr. Harsha, I show you Pet's Exhibit No. A-32 for identification and ask you to tell me what that is?

A. This is the advertising expenditures for frozen fruit pies.

Q. For what year?

A. 1957 through fiscal 1962.

Q. And these figures were taken from the P & L statements of the Pet Milk Company? Yes?

A. Yes.

The Court: Well, now, I don't know about that. The witness shows a lot of reluctance to answer the question, and you say "yes" to him. What does that mean?

Mr. Lamb: I withdraw it.

[fol. 929] The Court: Yes. I don't think this witness knows where those figures came from. Somebody else prepared that. Ask him those questions and let's see, let's find out.

By Mr. Lamb:

Q. Do you know who prepared this statement?

A. I presume our accounting people.

Mr. Alioto: He presumes. I make a motion to strike that.

The Court: It is stricken.

Mr. Lamb: Your Honor, can I have this witness step down and have Mr. Wohlhueter come to the stand to have this identified?

The Court: Do you need it identified at this point?

Mr. Lamb: Well, in order to get the full amounts for each one of these years—if Mr. Alioto will stipulate this.

Mr. Alioto: Mr. Lamb, if you will tell me these are figures taken from your books and if you will give me your word on it, I will accept it and stipulate those are the figures.

Mr. Lamb: Yes.

Mr. Alioto: I will stipulate.

• • • • • • • •

By Mr. Lamb:

Q. Mr. Harsha, I show you Pet's Exhibit A-33 for identification and ask you to tell me what that is?

A. This is the total advertising and promotional expenditures for the frozen fruit pies of the Pet Milk Company, 1957 through fiscal 1961.

Q. Are the figures on that chart the same as the figures on Pet's Exhibit A-32?

A. Yes, they are.

Mr. Lamb: Your Honor, I offer this chart in evidence.

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[fol. 930] (The document marked Defendant's Exhibit A-33 for identification was received in evidence.)

Mr. Lamb: Ladies and gentlemen of the jury, this is a pictorial account of the expenditures of advertising media, cooperative advertising, coupons, store demonstrations, samples, all other promotions.

Now, this shows, as you can see, that in 1957 the Pet Milk Company expended 503,900 in national advertising. That was the Red Skelton show that we've been talking about. In 1958, 401,000. In 1959, 305,000. In 1961, 199,000. And it went off the chart in 1961.

Then cooperative advertising, in 1957, was $39,700. In 1958, $108,600, and so on.

Coupons, you will note, was $154,900. 1957. Then down to $141,000, down to $43,000, down to $14,000. And then down to $1,100.

And you see that samples were $33,400, and then to $22,600, and then $14,700, and then to $12,200, and then to $10,300.

And then the "All Other Category" was $202,400 for 1958, $342,700 in 1959, and it drops to $27,400 in 1960, and $11,400 in 1961.

By Mr. Lamb:

Q. Mr. Harsha, will you tell the jury whether or not the Pet Milk Company had a specific plan for the years 1957, '58, and '59?

[fol. 931] Mr. Alioto: If your Honor please, in 1957 he was in Canada and doesn't know anything about the policy at that period of time; and that appears to be the most important time.

Mr. Lamb: If your Honor please—

Mr. Alioto: —He wasn't here.

Mr. Lamb: —the witness testified that when he came to his position in September, 1958, that he examined the previous history of the sales promotion.

Mr. Alioto: I submit, if your Honor please, that doesn't make him competent to tell what the policy of the company was as formulated in 1957 by Mr. Gamble and Mr. Latzer and others.

The Court: It's hearsay, isn't it? Sure, he testified that he reviewed it, looked at documents, and I suppose talked to people. But that's all. The objection is sustained.

By Mr. Lamb:

Q. Mr. Harsha, when you came to your position as general manager of the Pet-Ritz Division in September, 1958, what did you find?

A. I found an organization which had expanded rather quickly, an organization and a product line which had expanded rather rapidly, and a planned approach for investment spending to build a company, in an industry that was growing at a rather dynamic rate. And this is in essence what I found.

Q. What did you do as general manager with regard to the conditions that you found?

A. Well, it was my job to at that point in time review through the past history of the operation from its inception, as far as we were concerned, in 1955, what we had

done, why we had done it, and what we hoped to do in the future as a basis—this, then became the basis, the past facts. So it was at that point in time that I realized we had invested, quite properly so, with a planned purpose in mind, monies to develop a market; and that market was developing, but at that point in time I felt it was necessary to review, as we did, as my associate prior to me had done, to assess our position at that point in time. And then to develop our plant for the future operations, future course of action.

Q. What did you do then?

A. At that point in time, I felt it was—we had expanded the market sufficient to give us a good business, and at that point in time, I felt it was necessary to review very closely the expenditures that were making and had been [fol. 932] making, which were all justified, and were all a part and necessary to acquaint the consumer so that she would buy the product. And at that point in time I felt it was very necessary that we should then start returning more on our investment.

Q. Mr. Harsha, you've used the term "investment spending." Will you tell the Court and jury what that means?

A. Well, investment spending to me is very simply stated.

It is that you take a given amount of money, and you invest it in whatever you have deemed advisable, and you also say to yourself, "How long is it going to take me to return monies on what I'm investing?" For the sale of a product in this particular case. So investment spending, as I refer to it, in this particular instance, is taking a product line, a concept, in a new, small company, and developing that. And it takes time to do this, it takes money. You have to communicate to the consumer, and this all takes time and money. So that is what I choose to call investment spending. Acquainting the consumer, building a market for yourself and for your company for the future.

Q. Where do you get the money for this investment spending?

A. Purely and simply, you borrow it.

Q. Who do you borrow it from?

A. In this particular case, we borrowed it from our total corporate operation.

Q. Are you required to pay it back?

A. We are not only required, but we are judged on the efficiency of our operations as management people to maximize our investment.

Q. Did you take any severe or drastic—make any severe or drastic changes in the promotion of the Pet Milk Company?

A. I laid—I promptly started to develop plans, which in turn were executed shortly thereafter to drastically reduce the expenditures.

Q. Tell the Court and the jury exactly what you did.

A. We reduced the amount of advertising dollars that we were spending. We reduced the amount of in-store demonstrations. We felt that we had communicated to the consumer through grocery store demonstrations, which in turn cost the salaries of store demonstrators, and the sampling of the pie—all of these things we felt we had done sufficiently at that point in time to establish our business, our brand, in the market place throughout the United States, where we at that time then could on a modified and an existing expenditure level, return a profit to our company in this operating division.

[fol. 933] Q. What happened in 1960? Well, let me rephrase the—

A. In 1960, specifically, that program was carried out and accelerated.

Q. What happened in 1961?

A. Even further accelerated to the point we almost completely eliminated what we choose to call marketing expenditures in the sense of advertising and sales promotion.

Q. And what did this do to the net profit of the frozen pie division?

A. Brought it into line.

Q. What do you mean by that?

A. Black.

Mr. Alioto: In what year?

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Mr. Lamb: Our fiscal year '61-'62. Our fiscal year ends on March 31, your Honor.

Mr. Alioto: For whatever it's—

Mr. Lamb: So in order to give you a correct answer, you have to refer to it in that fashion.

The Court: Go ahead.

By Mr. Lamb:

Q. Was there any change made in 1959 which related to the plans that you had formulated when you came to the frozen pie business in September of 1958?

[fol. 934] A. I'm not sure I understand your question.

Q. Could you look at the profit and loss statement for 1959 and tell us, if you will please—here—

A. Here we are. That's the sales division. We need the total.

Mr. Lamb: Now, Mr. Harsha, I hand you Pet-Ritz Food Division—Pet Milk's sales and earnings, which is Pet's Exhibit A-30, Year to Date 1959, and ask you if you can tell me what the financial position was. First of all, did you put your plans into effect after you became manager?

A. Very definitely.

Q. Did those plans show any major change in the financial change of the company?

A. Yes. They decreased the net loss substantially.

Q. How soon did that take effect?

A. Well, it started to take effect in—within '59 and '60.

Q. Did it continue, or did you encounter problems with regard to it? Have you had any further problems with regard to losses since you took over in September of 1958?

A. None. Not to speak of, no.

Q. In 1958, when you were in the general manager's position and you were planning your production and promotion, and you were budgeting for it, did you intend to use the money to put the Utah Pie Company out of business?

A. No.

Q. Did you know anything about the Utah Pie Company in 1958?

A. I did not.

Q. When did you first learn there was a Utah Pie Company?

A. When this lawsuit was developed.

Q. Mr. Harsha, in your position as an industrial manager, is frozen pie the only product that you have budgeted a planned promotional campaign for which resulted in losses?

A. No.

Q. Have you planned other programs in which the company has received a return—well, I'll ask it a little different way.

Mr. Alioto: That's objected to, if your Honor please, and I make a motion to strike an answer as to anything they may have budgeted in other fields, unless they want to open up the competitive situations in those other fields.

Mr. Lamb: Your Honor, the point I was trying to establish was the materiality of the financial investment spending program, that this is a—

The Court: Well, what you're asking about is fields other than the frozen pie field; and it seems to me it hasn't any relevance.

[fol. 935] Mr. Lamb: Your Honor, the only relevancy is the contention of plaintiff's counsel with regard to subsi-

dization. That's where the relevancy comes in. Throughout this lawsuit the plaintiff has taken that contention; and it, therefore, seemed to me to be relevant material—

The Court: I see your point. What about that?

Mr. Alioto: I have no objection to it, so long as counsel understands that it might open up the competitive situation in these other fields. As long as he understands that. And I think he knows some of the fields I'm talking about.

Mr. Lamb: I really don't, but I'll proceed, your Honor.

The Court: All right. The objection is overruled.

By Mr. Lamb:

Q. Mr. Harsha, have you had anything to do with launching of other new products?

A. Yes, I have.

Q. And when you launch a new product, what do you do?

A. Well, you have to invest money. You have to invest monies in capital equipment, for new types of processing—manufacturing equipment. Once you do that, then you have to invest money on your advertising and marketing. You have to communicate what you have to the consumer, and this requires money. You have to tell them what you have. So it's an investment spending program, as far as I'm concerned.

Q. Well, do you expect to make a profit in a new product the first year?

A. No.

Q. The second year?

A. Very rare.

Q. The third year?

A. This is becoming more in line. The third year, break-even, what we choose to term as a break-even, starting to show a profit.

Q. Do you have an expert knowledge with regard to how long it has taken to introduce new products in the food business?

A. Generally speaking, this would range from a 5-year period before you start to make a profit, net profit.

Q. Now, in the case of frozen pies, have you always throughout this period made a gross profit?

A. We have always made a gross profit on frozen pies.

Q. Then will you tell the Court and the jury what you attribute the losses that appear on these P & L statements to?

[fol. 936] A. Purely and simply your sales and advertising promotion, your investment spending to communicate this product, this product that you have to the consumer. This is to pay for the advertising, for the demonstrations, for all the things that are required.

Q. Can you state for me whether or not such a national market for frozen pies could be created without the national advertising program and promotions?

A. In my considered opinion, it would be impossible.

Q. Mr. Harsha, when did the Pet Milk Company decide to go into the private label business?

A. Just about the time that I was made general manager of the operation, and that would be specifically in 1958.

Q. Were you the individual who negotiated the contract in 1958 with the Safeway Company?

A. I didn't individually. I was responsible as the general manager; and I had discussions with the Safeway people, yes.

Q. In addition to going into the private label business, would you tell the Court and jury what other plans the Pet-Ritz Division of the Pet Milk Company decided upon to bring it into a profitable position?

A. Well, we expanded the product line from four flavors to some 25 flavors. We expanded the product line from fruit flavors to cream pie flavors. We expanded the entire frozen product line to include date nut bread and banana bread. These are all dessert, complementing the line, giving us more efficient, economical distribution patterns. So we broadened our base in the product line in order to spread these investment expenditures which we had been making.

Q. Did you stay in the 24-ounce pie, or did you make any changes with regard to weight?

A. No. We decided that we had invested a tremendous amount of money over the past three or four years, and wisely so, in the Pet-Ritz name. This was a name of quality. It represented to the consumer something that we were proud of. So we didn't feel in marketing strategy it was wise at this point in time to do anything to retard or shall we say affect the quality of the Pet-Ritz label. We at the same time realized through our marketing research studies, which I asked for, and were given to me, to give me a picture, a profile, if you will, of the market, what was the market existing at that time; and we found that the market was moving from the outset and the early stages from a quality line product to a two-type product. We chose to call it an economy market and a quality market. We did not want to downgrade our Pet-Ritz pies. So at that point in time, we gave serious consideration to, and then subsequently did, produce an economy pie, one which we felt the consumer wanted, and we felt incumbent upon ourselves to go into that phase of the operation, giving them both the free selection.

[fol. 937]. Q. Has the introduction of the Swiss Miss pie been a success?

A. I would say it has, yes.

Q. Mr. Harsha, I show you Plaintiff's Exhibit 47 in evidence and ask you to tell me what this is?

A. Well, this is a memorandum which I wrote to myself, so to speak, in San Francisco subsequent to a contract that I had made in the San Francisco Safeway office. This was a reminder to me of the things I had discussed while talking with Mr. Alan Young, who is the head buyer for the private label. This was a means of taking down so I would have this for my own ready reference any time I saw fit.

Q. Was anyone else with you when you negotiated the Safeway contract that relates to this memorandum?

A. Boyd Schenk was.

Mr. Lamb: Ladies and gentlemen of the jury, you have had this read to you before. Before I ask Mr. Harsha some questions with regard to it, I would like to read it so we will know what the questions are being related to.

"Detailed discussion was had with Young on the need to develop better cooperation between the Safeway Sales Division and the Pet-Ritz sales force in stocking Pet-Ritz pie.

"Young agreed to write a letter to each of the Safeway divisions requesting help in our behalf re-emphasizing the advantages and freight savings by pooling Pet-Ritz with Bel Air brand. In other words, Young will act as a door opener for our sales people, particularly in case of 9-inch fruit, creams, custards, and 8-inch fruit flavors not produced under the Safeway Bel Air label.

"In addition, Young will encourage the Safeway Sales Division to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz both in quality and in price.

"Young will send me a blind copy of the letter that goes to each Safeway Division, with the understanding our men are not to quote this letter. Schenk will advise as to the sizes and/or flavors by Safeway Sales Division on which we need support".

By Mr. Lamb:

Q. Now, Mr. Harsha, what did you mean by "blind copy"?

A. By that I meant—

[fol. 938] Q. "Young will send me a blind copy."

A. If he had sent me a copy, which he didn't, I might add, Mr. Lamb, that the blind copy—I didn't feel it was prudent business to show a letter which a man had communicated to me to someone else, purely and simply.

Q. Did you ever get Mr. Young to agree to push the Pet-Ritz line?

A. No, but I sure asked him for help.

Q. Did he ever give you any help in pushing the Pet-Ritz line?

A. Not to the extent I would have liked to have it.

Q. Did you ever receive a letter from him—

A. Never.

Q. (Continuing) —with relation to this memo?

A. No. This was a memo to me, Mr. Lamb.

Q. Did Mr. Young know of the existence of this memo?

A. I doubt it. I very seriously doubt it.

Q. Did anybody else in your company know of the existence?

A. I think not. The only reason Boyd Schenk's name was on there is that this was a reminder to me that he was with me in the contract.

Q. Do you have any agreement with the Safeway, whether in writing or otherwise, that they will push Pet-Ritz pies exclusively?

A. No.

Q. Have they ever pushed Pet-Ritz pies exclusively?

A. No, they haven't. They have eliminated them, unfortunately.

Q. Now, you have a contract with Safeway for the production of certain fruit pies, and, I understand, pumpkin and mince, is that correct?

A. That is my understanding.

Q. Does your contract cover anything but the fruit pies and pumpkin and mince?

A. No.

Q. At this time. Does the Safeway Company agree to buy their entire requirements of frozen pies from the Pet Company?

A. They do not.

Q. Are all of the divisions of the Safeway Company required to buy Bel Air pies from the parent company for sale?

A. They are not any more than they are required to buy

any of their private label commodities, whether it be soap or pies.

Q. In other words, do I gather that it is your testimony that each of the purchasing agents for the Safeway Division have complete autonomy?

A. Complete.

Q. They can buy or not buy the Bel Air pie, even though Pet has a contract with Safeway to produce a certain amount, is that correct?

[fol. 939] A. That's right. It is their buying committee that makes that determination in each of their regions or their zones.

Q. Mr. Harsha, is there any competition for the Safeway business other than Pet?

A. Yes, and they are represented in this room,

Q. Have you ever come close to losing the Safeway business to any of these competitors?

A. We have.

Q. To your knowledge, Mr. Harsha, do you know whether or not the Safeway Company entered into commercial arrangements with the Utah Pie Company to furnish Bel Air pies in the Salt Lake City market?

A. It was my understanding that they bought pumpkin and mince. Beyond that I have no understanding.

Mr. Alioto: If your Honor please, I make a motion to strike that. The witness said a moment ago he never even heard of Utah Pie until this case started.

The Court: The motion is granted. He certainly said that.

Mr. Lamb: That is agreeable, your Honor. Your Honor, I have some more examination.

The Court: Well, why don't you go on for another 15 or 20 minutes.

By Mr. Lamb:

Q. Mr. Harsha, the entrance of the Swiss Miss pie into the fruit pie market, when did that take place?

A. This took place—the planning stages were initiated by me at the advent of my taking over the division, which would then be in late '58. The introduction of the Swiss Miss pie per se, after formulation was developed, was in '59.

Q. Is there any difference in price between the Pet-Ritz pie and the Swiss Miss pie?

A. Yes, there is.

Q. What pies does the Swiss Miss pie compete with in the various markets?

A. It competes with, as I indicated initially, with the economy pie factor of the market, and these generally are the regional pie brands, which are the less-weight pies, and these are varying and large in numbers in terms of companies and labels.

Q. Will you tell me whether or not the Swiss Miss pie is sold in competition with the Pet-Ritz pie?

A. No, it is not.

Q. Will you tell me whether or not the Swiss Miss pie has—its sale has resulted in a diminution of the Pet-Ritz business?

[fol. 940] A. No, I don't think so, because the Pet-Ritz is designed for quality aspect of the market.

Q. What price method does the Pet Milk Company use to sell their frozen pies?

A. I am not sure I understand your question.

Q. Frozen pies are priced on a certain basis, that is, f.o.b. mill or delivered.

A. Oh.

Q. What basis does the Pet Milk Company use for its sales of frozen pies?

A. On a delivered basis.

Q. How long has the Pet Milk Company sold its frozen pies on a delivered basis?

A. It has always sold its pies on a delivered basis.

* * * * * * *

[fol. 941] By Mr. Lamb:

Q. Mr. Harsha, this morning your testimony relating to the economies that were effected in promotion and—including advertising and the like—may I ask you whether or not there were any other economies attempted during the time that you were manager of the frozen products division?

A. Yes. And these, similar to the promotional expenditures were planned. They were, for the most part, they were efficiencies through different innovating processing techniques, new types of processing. Additionally, it was the closing of the general office, which was a duplication [fol. 942] of overhead in Frankfort, bringing it down to St. Louis, reducing a substantial number of people, so that we could effect economies through machine bookkeeping which we had in the total corporate complex available to us. So these were the main factors. They were substantial, but they were the main ones.

Q. Do you recall how many clerical and executive personnel you had in Frankfort when that operation was closed down?

A. We reduced it some 22 accounting and clerical people in the office that were not replaced.

Q. How many then did you end up with?

A. We ended up with a staff of five people, plus machine bookkeeping, and I would estimate approximately four or five accounting people to do the machine bookkeeping.

Q. Now, are there any other economies that were effected in the frozen pie field?

A. I would say those were the main.

Q. Now, Mr. Harsha, you testified that just prior to 1958 that you were in charge of the Canadian operations of the Pet Milk Company. Is that correct?

A. That's correct, sir.

Q. Will you tell me whether or not you had anything to do with frozen pies at that time?

A. I had a lot to do, during and at that time. In Canada one of our product lines was the introduction of frozen Pet-Ritz pies into the Toronto-Montreal area. And during my monthly meetings back to St. Louis at headquarters, where I reported directly to Mr. Gamble, I also reported to him on my frozen pie operation in Canada—while it was small in amount—and I had to be kept close to the activities that were going on in the U.S., as they had a direct application on the Canadian market.

Q. Now, Mr. Harsha, there has been some testimony here with respect to the operation of off-invoice allowances and advertising allowances. In your capacity as general manager of the Pet-Ritz Frozen Food Division, did you have any experience with advertising allowances?

A. Yes, I did.

Q. Well, will you explain to the Court and to the jury how the Pet-Ritz Company handles advertising allowances?

A. An advertising allowance essentially is an allowance in terms of pennies per case, and it will vary depending upon your objective. In time it will vary also, but it's applicable usually over a thirty-day period of time. It is given to, or it is being made—it is offered to any direct buyer who in turn complies with the provision of that allowance. That provision can vary. Generally it is to feature in his weekly ads Pet-Ritz pies during the week end. And when he does that, then he then complies. And that is the promotional allowance. This is different than an off-invoice in the term. An off-invoice is another means of lowering the price, purely and simply. Generally it has no reference to a compliance or requirement.

[fol. 943] Q. Does the advertising allowance show on the invoice?

A. No, it doesn't. And the reason, because generally it follows behind. The mechanics of the bookkeeping are such. The allowance is made to the customer. The customer uses the allowance. It is up to the customer. And generally this is over a three-month period of time. He will accumulate those allowances. His buying headquarters

will. And then they make application to our company, if it's our particular case in mind. And they have to show us. If the ad allowance stipulated one ad per month during a thirty-day period, rather, then they have to show that they advertised Pet-Ritz pies during that period of time, for which we will render payment on their request. So the two don't normally fit together.

Q. How long a lag is there normally between the time that the program for advertising allowance is made and the time that it is paid?

A. Well, it has to be a minimum of thirty days, and generally—and if it's a buying headquarters like Associated Grocers, they do this for their independent merchants, and they collect those over a ninety-day period of time. So it can be anywhere from three months to four months to five months before payment is made to the customer for compliance.

Q. Is it correct, then, to say that the invoices that were used as a basis for the International Business Machines tabulation, which went into evidence this morning as Defendant Pet's Exhibit A-40—that it's normal for the advertising promotional allowances not to be contained on those invoices?

A. It is.

Q. Well, if you were to apply the advertising promotional allowances, how could you go about doing that?

A. I'm not sure I understand your question.

Q. There has been some questioning this morning by my worthy opponent with regard to the use of the invoices of the Utah Pie Company, which presumably contain the advertising allowances, as against the invoices that did not contain the advertising allowances, for the Pet-Ritz pies. Now, is there any way that that could be rectified? How could that possibly be done? That's my question to you.

A. Well, under our bookkeeping system, it's almost impossible, because the way the invoice is rendered; and to get their two per cent discount, which is terms, they have to pay their invoice in ten days, and if they had a month

to comply with the allowance, it certainly wouldn't be applicable. So they have to pay for the invoice, the sales invoice first. Then, if they comply during the thirty-day period of time, they render a separate statement showing proof of performance. On a proof of performance, the payment is made.

[fol. 944] Mr. Lamb: I have no further questions.

Cross examination.

By Mr. Alioto:

Q. Mr. Harsha, when did you first meet Mr. Alan Young of the Safeway Company?

A. I don't think I can recall forthrightly.

Q. Well, we'll see if we can't work it out in some fashion. You were in his office July of 1959?

A. That's right.

Q. On July 14, that's correct?

A. That's right.

Q. Had you met him for the first time that morning?

A. I think I met him—no. I think it was actually by phone was my first introduction to Mr. Young. And that would have been probably two or three weeks prior to that. I really don't know.

Q. So that you were introduced to him in effect over the telephone?

A. That's correct, sir.

Q. And prior to that time you had neither met him or talked to him?

A. I don't think so, no, sir.

Q. Now, what was the substance of that telephone conversation you had with Mr. Young two or three weeks before that meeting in San Francisco?

A. Evidently on the—I don't recall—evidently it was on the contract that we were negotiating with the Safeway people.

Q. Well, did you have any participation in the negotia-

tion of the Safeway contract prior to the time of that telephone call?

A. Not the initial one, no, sir.

Q. This was the second contract? Is that it?

A. This is a continuation of the contract. It had not been fulfilled nor signed, rather, yet at this point in time.

Q. So this was a continuation of a prior contract?

A. The date of this is 19—what is the date of that?

Q. The date is July 14 of 1959, the date of your meeting with Mr. Young.

A. I think that's the first time I met him, to be very forthright.

Q. And you have not—well, state what participation, if any, you had in connection with the Safeway contract or in relation to the Safeway contract, prior to the time you met Mr. Young in his office in California.

A. As the head of the division, it was my responsibility to approve the finalization of the contract. This is why I might seem a little vague. I was not in on the original groundwork developing the initial contract.

[fol. 945] Q. Now, your meeting with Mr. Young in California on July 14 of 1959 was for the purpose of negotiating a modification of whatever arrangement you had at that time, wasn't it?

A. That's correct.

Q. And I take it you came to that meeting prepared to negotiate, prepared to make whatever decisions had to be made?

A. I went there to discuss the contract.

Q. Now, this memorandum, which is Plaintiff's Exhibit 47 and which you say you wrote in San Francisco—is that correct?

A. Yes. After the conference was had.

Q. Now, I take it you wrote this memorandum in the regular course of your business for the purpose of carrying on your business?

A. It was for the purpose of reminding me of the conversation I had had with Mr. Young.

Q. In order that you might implement whatever agreements you made with Mr. Young at the time; isn't that correct?

A. Not necessarily. To remind me of what I had said.

Q. Well, somebody had to communicate those decisions to somebody else in the organization? That's correct, isn't it?

A. These were not decision-making—this was not decision-making information. This was for my purpose, Mr. Aliote.

Q. Now, look, Mr. Harsha, I want to call your attention to this thing. "The following points were covered and agreed on in a discussion which took place in the office of Alan Young between Boyd Schenk and me."

Now, you are that "me," aren't you?

A. That's correct, sir.

Q. Promotional allowances which were effective July 8 on apple, cherry, and peach—specifically, the Safeway Divisions noted below will be affected, as a result of the promotional allowance for the period of the allowance."

And then you name all of these divisions, Kansas City, Wichita—there are about twelve of them, or more, Salt Lake City included. Then you go on to say: "Young agreed to a reduction in the differential in the amount of six and a half cents per case in all areas where the allowance was effective."

Now, that was a business decision relating to price of some considerable importance, isn't it?

A. That's one factor.

[fol. 946] Q. All right. So this memorandum was written, among other things, for you to preserve whatever agreements were made, so that you might execute those agreements?

A. It was written to preserve information that I had made, so that I would have available to me, or the things that I had agreed, if you will, whatever you are indicating there, or what I had said, whether it was an agreement or not. It was a reminder for me. I just don't—I'm not able

to carry in my mind all of the things that I say during the normal course of time.

Q. Is this a reminder for you to keep in your head without communicating it to anybody, or was it a reminder for you to communicate to the responsible people in your organization for the purpose of carrying out the deals you made with Young? Which was it?

A. It was for a reminder—it was a reminder for my own personal use, and the person who was with me was of such importance in his job that I had no concern that he would not carry the agreement out that we had made or any discussions we had made. I had full confidence in his ability to carry those discussions we had out.

Q. As a matter of fact, you gave that person, namely, Mr. Boyd Schenk, a copy of this memorandum, didn't you?

A. I did not. Not to the best of my knowledge.

Q. Would you take a look at that memorandum, please? Do you see the name "B. Schenk" written across it?

A. That's right.

Q. Whose handwriting is that?

A. That's mine.

Q. That's your writing?

A. That's my writing.

Q. All right. Now, Mr. Schenk testified he probably received a copy of this. Don't you recall that you instructed whoever it was that took this memorandum from you to see that Mr. Schenk got a copy?

A. No, not necessarily, because he had his own way of reminding himself of the things that he did. I have tried to explain to you that this was done shortly after I left the office of the Safeway organization in San Francisco, went back to a sales office of ours in San Francisco, promptly sat down and dictated a memorandum to myself, so that I would be sure that I'd have for my future use, as, if, and when I deemed it advisable to have it, what I said, what I wanted to do, purely and simply.

Q. Just for yourself?

A. Certainly.

Q. Well, if it was just for yourself, why did you make a carbon copy of it?

A. I don't really know. I might have made four copies.

Q. And you don't know why you wrote "B. Schenk" on it in your handwriting?

[fol. 947] A. Probably to remind myself that he was there. I don't know why I wrote it up there.

Q. You wrote "B. Schenk" here to remind yourself that he was there, when he's mentioned in the body of the typewritten letter?

A. No. I said probably. That could have been one reason. I can't give you the reason I wrote it.

Q. Then the next discussion relates to the contract. "2. Discussion of the Contract." "Young agreed to a renewal of the contract for a period of one year, effective date to be May 15 of 1959."

And then you have a question mark after that. Would you be good enough to tell us the meaning of that question mark after that date? Do you see it there?

A. Uh huh. I don't know why the question mark was put there.

Q. Did you read this memorandum after the young lady prepared the original and copies of it?

A. Put it in my briefcase, and from that point on I really don't know when I ever referred to it or if I referred to it.

Q. Well, how did the memorandum get into the briefcase of Mr. Wohlhueter when he came to this stand?

A. I have no way of knowing, other than my records. When I'm in a business, and when I return to my office, there's nothing to hide. I probably sent it to file.

Q. Let's get down to the paragraph read by your counsel, and then we'll come back to the contract. It goes on to say: "Detailed discussion was had with Young on the need to develop better cooperation between the Safeway Sales Division and the Pet-Ritz sales force in stocking Pet-Ritz pies."

Now, do you remember that that detailed discussion took some time?

A. Well, the whole conference—I'm not sure how long it took. I suspect it was two or three or four hours. It was before and after lunch.

Q. Yes.

A. How long I really don't remember. I would estimate four hours.

Q. Four hour conference?

A. Ten until lunch, and then until two—I really don't remember.

Q. And then the next sentence is, and I'd like you to listen to this: "Young agreed to write a letter to each of [fol. 948] the Safeway Divisions requesting help in our behalf reemphasizing the advantages and freight savings by pooling Pet-Ritz with Bel-Air brand."

Now, did Young make that agreement, or didn't he make that agreement?

A. Young—in the sense of that, or the meaning of that word "agreed," this was my hope, and any businessman's hope, to maximize the effectiveness of his operation. And in talking to Mr. Young, I pointed out to him the benefits to the Safeway organization and to our company that if he were to pool products—and I hoped and prayed that he would give us some support—whether he gave us support I have no way of knowing. He did not agree to write me a letter or contract, no, not in the sense of the word "agreed" there that I think you're trying to imply.

Q. Well, the letter reads—the words are: "Young agreed to write a letter." Now, are you telling us now that that really means you hoped he would write a letter?

A. That's exactly. And I see nothing wrong with that.

Q. "Young agreed to write a letter." That doesn't mean he agreed to write a letter?

A. Well, I think you are playing on the word "agreed."

Q. Yes, I surely am.

A. I would say he "agreed"; I would hope that he would do as I asked him to do. Now, that is his business.

Q. Then, to go on: "In other words, Young will act as a door opener for our sales people, particularly in the case

of 9-inch fruit, creams, custards, and 8-inch fruit flavors not produced under the Safeway Bel Air label. In addition, Young will encourage the Safeway Sales Division to stock Pet-Ritz flavors."

Did he agree to encourage them to do that?

A. No, I don't think he agreed. I asked him, and I hoped that he would. He might have said to me, "I will do everything I can," I don't know. That wasn't a contract. You don't see his name on there, do you?

Q. "In addition, Young will encourage the Safeway Sales Division—" I am reading again. "—to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz both in quality and price."

Do you remember having that discussion with Mr. Young?

[fol. 949] A. I certainly do and I certainly—

Q. You told him you wanted him to use his best efforts to knock the competitive pies out of Safeway?

Mr. Lamb: I object to that, your Honor.

The Court: Overruled.

Mr. Lamb: That is a characterization.

The Court: Overruled.

By Mr. Alioto:

Q. Did you tell him that, in substance and effect?

A. You use the word "knock" a little differently than I would like to use it, to answer your question, if I may, your Honor—

The Court: Suppose you answer counsel's question, and I am sure he will be agreeable to let you say anything you want.

A. All right. I asked Mr. Young to assist us and to assist himself in those areas where it would be to our mutual benefit to feature and to stock Pet-Ritz pies. Now, whether

he did it is another question. I don't know. I don't think he did because subsequent to that we lost distribution in some areas.

Q. The next sentence is: "Young will send me—" "Young will send me a blind copy of the letter that goes to each Safeway Division."

Did he say he would, or were you hoping, in some fashion, that he would send it to you?

A. I was hoping, and, in the fashion, I think of an optimistic sales manager, but he never sent it.

Q. Mr. Harsha, do you mean to say that you and Young didn't discuss the idea of sending a blind copy?

A. No, we did not. I didn't, and he didn't with me.

Q. How could you have written this thing, "Young will send me, will send me, a blind copy of the letter that goes to each Safeway Division"? How could you have written that if there wasn't some discussion between you and Young about it?

A. It is obvious that we didn't receive a letter, so there was nothing to—I got no copy from him, so there was no agreement. I never received a letter from Mr. Young.

[fol. 950] Q. Why a blind copy?

A. I suspect Mr. Young doesn't even know that that memorandum was written to myself. In fact, I know he doesn't.

Q. I am sure he doesn't. Why a blind copy? Why did it have to be blind?

A. I think this is prudent business. I don't always send letters out in my operation to other people. I think I reserve the right to say whether I want to have a blind copy or not as prudent business.

Q. In other words, was it your hope, as distinguished from whatever you agreed to, was it your hope that Mr. Young would conceal from his own personnel the fact that he was currently informing you of his efforts by letter?

A. I don't like your selection of the word "conceal," no.

Q. It goes on to say, to complete that sentence, "Young will send me a blind copy of the letter that goes to each

Safeway Division, with the understanding our men are not to quote this letter."

Did you or didn't you have that understanding with Young?

A. We had no agreement as to a letter that was going to be sent out, in the sense that you are trying to portray.

Q. Mr. Harsha, the next sentence is: "Schenk will advise as to the sizes and/or flavors by Safeway Sales Division on which we need support."

Schenk will advise whom?

A. I would suspect he would advise Mr. Young.

Q. Of course. And that was the agreement that you, Schenk, and Young made at that agreement, wasn't it?

A. There was no agreement.

Mr. Lamb: I object.

The Court: The objection is overruled.

By Mr. Alioto:

Q. Now, then, on the contract itself, your counsel asked you whether or not the Safeway contract had in it an understanding that Safeway wouldn't deal with competitive manufacturers on the same fruit flavors with which they were dealing with you, so far as the Bel Air label was concerned. Do you remember that testimony?

A. No.

[fol. 951] Q. This morning?

A. His discussion with me?

Q. Yes.

A. Yes, I remember that.

Q. You remember that. Is your answer true that you didn't have an understanding that Safeway would not deal, in connection with Bel Air fruit flavors, with competitive pie manufacturers?

A. We had no such deal.

Q. Did you ever have any such discussion?

A. No.

Q. I want to point out in your letter—in your memorandum, Paragraph B under "Discussion of the Contract"—incidentally, where you say, "under discussion of the contract," "Young agreed to a renewal of the contract for a period of one year," I take it that he means he agreed to it?

A. Of renewal of the provisions of the contract.

Q. That doesn't mean you hoped he might.

A. This was the basic contract.

Q. So "agreed" there means what it says?

A. To the extent that we had discussed it, but from the time you sign a contract and when you agree or discuss, there is a substantial amount of time.

Q. Then you go on to say, "the," "General agreement was reached on all points of the present contract; exception: Modify or eliminate the following points: No. 1, 3, 4, 6, 10, 11."

Do you know what Point 4 that you agreed to modify or eliminate—do you know what Point 4 was?

• • • • • • •

A. I don't—these points, I think, refer to the numbered points in the contract, Mr. Alioto.

By Mr. Alioto:

Q. And doesn't that Point 4 specifically refer to the subject matter of whether or not competitive—Safeway may use competitive pie manufacturers under certain circumstances?

A. I don't remember the wording of the contract. I didn't write it verbatim.

[fol. 952] Q. The contract won't help you on that, because it is deleted. Let me show you in evidence in this case, as Plaintiff's Exhibit 42, which is the Safeway contract, effective as of January 1, 1960, and with it a letter from Mr. Schenk.

• • • • • • •

Q. Yes. Now, then, in his letter, which he is writing about—he talks about Paragraph 4 of the amended agree-

ment. Now, you remember that is one of the paragraphs on which you say you had general agreement.

"Paragraph 4 of the amended agreement—"

This is his letter to Alan Young on the date of January 6, and he states:

"In Paragraph 4 of the amended contract we have deleted completely the sentence, 'if seller is unable to deliver the two million-case quantity, buyer shall have the right to procure supplies from other packers in the amount seller is unable to deliver.'"

Now, do you remember that you discussed that matter? [fol. 953] A. Not in that conference.

Q. With Mr. Schenk in this conference?

A. Not that specific point, I don't think. I don't recall having done it. Maybe Mr. Schenk did.

Q. Do you know anything else No. 4 refers to except that same No. 4 in Mr. Schenk's letter?

A. No, I don't.

Q. Do you remember the subject matter at all being discussed?

A. Of the conversation in general?

Q. The subject matter about other packers being able to do it and the deletion of that particular clause?

A. I don't remember that, no.

Q. You understood that your Safeway Bel Air contracts on fruit flavors was a total-requirements contract, everything they require you will pack for them; you understand that, don't you?

A. That is not true.

Q. Do you know one single packer—let me ask you this—one single packer during the time of your contract who supplied Safeway with as much as one pie, a fruit pie, not pumpkin or mince, with as much as one pie in any Safeway store in any part of the United States, other than yourselves?

A. No, but that doesn't mean that they didn't try to.

Q. Is the answer "no," that no other packer has during the life of the contract?

A. They supplied pumpkin and mince, and I don't see why you should separate them.

• • • • • • •

[fol. 954] By Mr. Alioto:

Q. Mr. Harsha, so we can return to this subject matter and put it in some kind of focus, it is a fact, is it not, that there has not been one single manufacturer of pies who, under the Bel Air label, has supplied any Safeway Store anywhere in the United States during the life of your contract with one single fruit pie, and I am excluding pumpkin and mince. That is a fact, is it not? And then you can say anything you want after you state whether or not it is a fact.

A. I don't know whether that is a fact.

Q. Then you think maybe somebody else might have done it, is that it?

A. No. As I said, I would be disposed to think there has not been anybody, but you ask as a fact, and I do not know.

Q. In any event, it is your present testimony that you don't even remember discussing with Mr. Young the deletion of that paragraph that would have permitted him under certain circumstances to go to other suppliers?

A. He has always—

Q. You don't even remember the subject matter?

A. To the best of my knowledge he has always—he, representing Safeway—have always had the right to go anyplace to buy anything they want, and I think they exercise that right.

[fol. 955] Q. Why did you insist on deleting the paragraph, then, which would have given him that right?

A. I am not sure I did that specific point. We discussed it maybe. I don't remember, Mr. Alioto.

Q. That is what I am saying, you don't remember it at all, is that it?

A. That has been sometime ago, and that is another reason why I make memos.

Q. Is the answer that you don't remember it at all?

A. Not the specific details, no.

Q. Do you remember any discussion about competitive pie manufacturers?

A. No, but if it came in, it came in on fruit requirements probably.

Q. Now, then, you were head—you were the superior, were you not, of a Mr. Dittman, who was here in the courtroom on Saturday and testified? You were his superior, weren't you?

A. At what point in time? I have on several occasions.

Q. Were you his superior in 1960?

A. Yes, I was.

Q. And were you in 1960—did you still have general jurisdiction in connection with the Safeway contract?

A. Not in the latter stages, no, sir, Mr. Alioto. If you will recall, I was general product manager of the corporation at that time.

Q. At what time?

A. In June, 1960.

Q. Prior to June of 1960 you still had something to do with the Safeway contract, didn't you?

A. Yes.

Q. You recognize, don't you, that the Safeway contract accounts for approximately 40 per cent of your total pie production?

A. I am not aware of that.

Q. Well, do you know what percentage it accounts for?

A. No, because I don't keep those figures in my mind. Those are details that I don't bother with. I know it represents a substantial portion of our business, yes.

Q. Did you know about the fact that Mr. Dittman delegated to Mr. Schenk the responsibility of finding out what made the Utah Pie Company tick?

A. No, I do not know that.

Q. Did he talk to you about it at the time?

A. No, he did not.

• • • • • • •

[fol. 956] Q. Did the people in your organization ever discuss with you that your competitive threat on the Safeway contract—

Mr. Lamb: I object to this, your Honor, to "competitive threat." That is a characterization. The record shows that there was competition for this contract.

The Court: Well, I am going to overrule that objection. This is cross-examination.

• • • • • • • •

Q. Now, just a few other points I think we can cover hurriedly. When you were being asked about whether you made money or whether you finally came into the black, or when it was you lost money, I want to call your attention to the interrogatories filed in this case, which I will read, so there won't be any question about it, filed by your company:

"National sales of frozen pies are as follows: 1957, two million one cases; 1958, 2,500,000 cases; 1959, 4,700,000 cases; 1960, 4,000,000 cases; 1961, 5,200,000 cases. There have been no net profits for these years. A gross profit has been realized for the years in question, but allocation of home office expense has resulted in a negative net profit position."

[fol. 957] Now, I take it—these are the sworn answers of the Pet Milk Company. I take it that "negative net profit position" means loss, is that right?

A. I would think so.

Q. Yes. And so this shows that even on your 1961, with five million cases of pies, that you lost money, that is correct, isn't it?

A. Net profit, I presume.

Q. Now, in 1959, in your annual stockholders' report, the following statement appears:

"The record sales volume of $190,000,000 for the year primarily reflected increased sales in the dairy division and in the Pet-Ritz frozen pie line."

Then it goes on to say:

"Completion of the national introductory program, started with the acquisition of Pet-Ritz in 1955, made possible a significant reduction in operating expenses relating to our frozen pie business. This, combined with increased sales volume, brought us to the break-even point in our frozen pie business during 1959."

That statement is not correct, is it, that you broke even on pies in 1959?

A. I think it said "about break-even", and I would imagine if Price-Waterhouse signed that, it would be substantially correct.

Q. "This, combined with increased sales volume, brought us to the break-even point in our frozen pie business during '59."

. . . . . .

[fol. 958] Is that statement true, or were the interrogatories true?

A. I think it is substantally true, both of them.

Q. Both of them?

A. One is in actual dollars and cents, and this is generalizing in the sense of the report to the stockholders.

Q. Let's see, I think we have your 1959 loss here.

A. There is your figure.

Q. Pre-tax profits in 1959 came to a loss of $29,000. That is correct, is it not?

A. That's right. It is substantially at a break-even point.

. . . . . .

[fol. 959] Q. You were asked about this. That is the reason I was trying to inquire. You really don't know anything about how your zoning system came about, do you, Mr. Harsha?

A. Yes, I know how it came about.

Q. How did it come about?

A. Through the natural evolution of jobbing lines, the marketing—

A. It came about through the natural evolution—

Mr. Lamb: Let him finish.

Mr. Alioto: I'm sorry. I didn't mean to interrupt.

A. (Continuing) Through the normal course, if you are relating to any—of the one that was shown or any of these, it is in the normal course of business that is done, and freight, economic considerations.

[fol. 960] Q. It is a natural evolution, is that the way it develops?

A. No, it is—yes, it does, as a result of economic factors in the market place in terms of your plant in relationship to freight, in relationship to the market.

Q. And in terms of just copying the Carnation zones, whatever they might be?

A. We aren't interested in copying Carnation's zones, any more than I suspect they're interested in ours. Our problems are different.

Q. In other words, your problems are different. Therefore, your zones should be different, shouldn't they?

A. Not necessarily. What we do is our business. What they do I suspect is theirs.

Q. You copied the Carnation's price zones when you started in 1957, didn't you?

A. I'm not so sure that that's the case, no. Pet-Ritz might have been in the early stages before we acquired them, might have had his own zones. They might have acquired them. They, too, acquired the company from Simple Simon. I don't know, Mr. Alioto. I'm sure we didn't copy ours from them.

Q. You're sure you didn't copy from Carnation?

A. Well, I see no reason to, because our problems are different.

Q. Well, I don't, either. Let me show you this letter. Let me show you this letter. To Miss Eunice Cox. You know who she is, don't you?

A. Yes.

. . . . . .

Q. "Now that we have production facilities, we feel it advisable to return to the manufacture of 9-inch institutional and restaurant size pies. In checking the pricing structure of competition, we find that Simple Simon is selling their 9-inch pie both to institutional and restaurant trade, as well as to retail trade, and that they have a zone pricing as follows."

And then follows the zones for Simple Simon. And then below them, the zones for Pet-Ritz as proposed. Now, do you know of any reason why Pet-Ritz in connection with the sale of its 9-inch pies should simply copy Simple [fol. 961] Simon's zones and have substantial identity and actual identity in most cases with the Carnation prices in 1957, if your problems were different, as you say? Do you know of any reason?

A. I was in Canada during that time, if you will recall.

Q. In other words, you wouldn't have done it this way; is that it?

A. I didn't say that.

Q. Do you know of any reason, in the light of all of the study that Mr. Lamb says you've made of this company, why with different problems your company should copy the Carnation price zones almost identically?

A. I don't think we did copy them.

Q. Do you want to look at this again?

A. I don't need to look at it.

Q. Well, you'd better look at it, if you give that kind of an answer. Zone 1 of the Carnation Company is California. Right? With an ex-truck price of $5.78 ex-warehouse, $5.94. Zone 1 of the Pet Company, California, $5.78, $5.94. That's identical, isn't it, so far as Zone 1 is concerned? This is your own memorandum. This is a Pet memorandum, I might point out.

A. I told you I had no knowledge of that.

Q. Can you give us any reason in the light of your study that Mr. Lamb says you made over the years as to why it was with different problems the Pet Company should copy the zoning system of the Carnation Company in 1957?

A. I—I have to forthrightly tell you again, I don't think our company copied their zones or pricing.

Q. The second zone of the Carnation is Oregon, Washington, Utah, Idaho, Wyoming, West Nebraska, Colorado, New Mexico, El Paso, Texas. Your second zone, as you will see from Plaintiff's Exhibit 39, Oregon, Washington, Idaho, Utah, west Nebraska, Colorado, New Mexico, El Paso, Texas. It's exactly the same, isn't it?

A. On that point, yes.

Q. Their fourth zone is Texas, except El Paso, and others. Your zone includes Kansas City except El Paso and New Mexico.

A. Did it include others in there, too?

Q. Well, your Kansas City—Carnation Company wasn't manufacturing in the east at this time, was it?

A. I don't know.

Q. You don't know that the Carnation Company in '57, '58, and '59 and during the period of time when you were head man in your organization, you don't know that the Carnation Company's only pie manufacturing plant was in Torrance, near Los Angeles, California? You don't know that?

A. I didn't know at that time, no. But it was my understanding that they were trying to set up an operation in Indiana, if memory serves me right. Now, whether they ever did, I don't know.

[fol. 962] Q. Now then, we heard a good deal about investment spending. That's a term that Mr. Gamble is quite fond of using, isn't it?

A. It's a term that all of us in our company who are involved in monies and management use quite often.

Q. And that's a term, I take it, that you heard a good deal at the Harvard Business School when you attended the Management class?

A. I've heard that a number of years, yes.

Q. Now, investment spending, as you stated this morning, means that you're prepared to sell at a loss over a number of years in order to get a national franchise or position in a market? Isn't that what it means basically?

A. No, it does not?

Q. What does it mean?

A. As management in our company, I would never recommend that our company would sell at a loss, out-of-pocket loss, I would never, because then there's no hope after your investment spending to ever come back and make a profit, because if you don't start out with a gross profit, how can you ever hope to end up with one, when you then have done your investment spending?

Q. I take it now that you're talking about gross profits, and not net profits?

A. That's exactly. That's what I said.

Q. Okay. And gross profits comprehends that nobody's salary, for example, who works in connection with the company will be allocated as an expense? Is that right?

A. That's generally right.

Q. Yes. For example—

A. If it's—

Q. For example, your own salary—and I'm going to refrain from asking you what your salary is, however great the temptation—your own salary, any work you did on frozen pies, for example, would not be allocated to the frozen pie division in determining profits and losses? That's what you mean by a gross profit, don't you?

A. That's exactly right.

Q. And the girls in the office, for example, who typed up the invoices or worked on the invoices with the machines—

A. That would all come—

Q. —frozen pie invoices, their expense wouldn't be put there, either, would it?

A. That would all come under selling and general administrative.

Q. Now, then, can we say that you understand investment spending to be selling at a net loss, as distinguished from a below gross profit?

A. I think that's right, yes, sir.

Q. Selling at a net loss over a substantial number of

years in order to establish a franchise in the market place? That's correct?

A. Right.

[fol. 963] Q. Now, you didn't act that way, however, when the Carnation Company was involved, did you, when you priced your 9-inch pies in connection with Carnation's pricing, you didn't have that philosophy then, did you?

A. I'm not familiar with that.

Q. Well, this exhibit reads, this same exhibit to Miss Eunice Cox, the attorney in St. Louis, this exhibit reads: "Since it appears from market studies that Simple Simon is doing considerable pushing of 9-inch pies at institutional and restaurant level, we feel that, in order to be competitive and to make a reasonable profit on our item, we should set our pricing along these lines."

Then it sets the pricing. Now, this idea of making a reasonable profit right at the beginning with prices like $5.78 a dozen—which is a high price compared with what we've heard here—$5.78 a dozen—that doesn't involve investment spending in that sense, does it?

A. I think we had been in business at that point in time, a year or two, hadn't we?

Q. It says 1957.

A. Which is two years, isn't it?

Q. Well, your investment spending, insofar as this area is concerned, lasted up until 1961, hasn't it?

A. I'm not sure when we went in, Mr. Alioto. I was not there when we introduced 9-inch. They varied by product line is what I'm trying to say to you. I don't know. I was not there.

Q. The letter starts out by saying: "Now that we have production facilities, we feel it advisable to return to the manufacture of 9-inch pies."

A. They might have had them before then. I don't know.

Q. Okay. Did you participate in this arrangement or in this business, conferences within your organization, where you budgeted actual losses for specific divisions, and in some cases budgeted more losses, for example, for Salt

Lake City? Did you have anything to do with that business?

A. At what point in time?

Q. At any time.

A. I have been involved in our company in St. Louis whenever I was involved with my division or my job within the company in all of our financial planning, as it pertained to the division that I happen to have been in at that time.

Q. Then you have sat in on those sessions where you projected these net losses for specific areas in advance of actually suffering them?

A. Planned—we always laid our plans out, objectives, what we wanted to do, the time that it would involve, and the amount of money that it would cost, and the things that we would have to do in order to do that, whether that be four years, five years, two years. And it would vary by product line.

[fol. 964] The Court: You haven't answered the question yet.

By Mr. Alioto:

Q. No. The question is, have you personally participated in those sessions in which your company has directly projected net losses in connection with its frozen pie business in areas throughout the United States, including Salt Lake City? Now, can you answer that yes, or no, and then you can say anything you want.

A. Yes.

Q. Okay. You have. And I take it that you participated in those business decisions in 1958 and '59, which are set out in this exhibit, which you've been testifying from, Plaintiff's Exhibit 7, where you had budgeted losses and actual losses in your San Francisco sales division, in your Salt Lake City sales division, you participated in those, too, didn't you?

A. Yes, sir.

Q. Now, this business about investment spending—let's strike that a minute. You testified this morning, you recall,

that there is something essentially local or regional, I think is the word you used, something essentially local or regional about the frozen pie business?

A. I did.

Q. It lends itself, does it not, to local companies or local people entering the business without too much difficulty?

A. That's correct.

Q. And because of freight factors, if a local company is within a specific region, it has an opportunity to prosper just in normal business arrangements because of its locality. That's correct, isn't it?

A. It not only has an opportunity, but through national companies doing what we did, investing money and spending to build the market, they participate over and beyond their investment. We make the market, and we hope to get more than our share, or our share. But the regional always develops or participates in that, because we have made the market. This is one of the penalties for national distribution.

Q. Do you think that you made the frozen food market, or did you get in on a market that was expanding and that had, I think, in your language, a growth at a dynamic rate? Which was it?

A. I don't think there's any question about what we helped substantially to develop it.

Q. In other words, you helped a wave that was already in existence, but you didn't create the wave, did you?

A. I think there was very few pie companies at that point, and I would say we were very active in developing that wave, as you call it.

Q. Now, I take it, that you know that the plaintiff company has been in business for some thirty years? In the pie business, not the frozen pie business.

[fol. 965] A. I wasn't aware of that, but—

Q. And that it got into the pie business in September of '57, the frozen pie business, September of 1957?

A. I heard that this morning, yes.

Q. Now, isn't it a fact that the natural result of investment spending, which involves selling at lower prices in

this area at times than you sold in other areas at exactly the same time, that the natural result of that is to wash out the independents?

A. No, it is not.

Q. I take it that you will agree with me that during the period of time when you have been head of this division that there have been different and lower prices in Salt Lake City than there were at your plants in California?

A. I'm not familiar with that, because I actually wasn't that close to the day to day operation. I don't think that I could be expected to be.

Q. You were pretty close to the Safeway contract, weren't you?

A. That was a big factor.

Q. All right. In the Safeway contract, which is in evidence, there is set forth a list of prices, so that Safeway would be—

. . . . . .

By Mr. Alioto:

Q. It's this schedule. These are called, "Price Differences Between Pet-Ritz Pies, Full trucks, and Bel Air Pies," dated January 1, 1960. Now, you will notice that their apple pie, for Pet-Ritz, the price in Salt Lake City is set out at $2.15, the base price.

A. $2.16.

Q. Salt Lake City, $2.16, whereas in Los Angeles and San Francisco it's $2.32 a case, or sixteen cents more where the plant is located, or 42 cents more a dozen. That's correct, is it not?

A. That's what it reads, yes, sir.

Q. Would you be good enough to tell this Court and this jury why it is that your basic price as you discussed it with Safeway in 1960, your basic price is lower in Salt Lake City than it was in California, where your plant was located?

A. I don't know why it was.

Q. You would agree with me, I take it, that if that low price—if the price is lower here and an independent is

located here, that that price would have a tendency to lessen competition or to injure that independent, wouldn't it, as distinguished from a $2.32 price?

[fol. 966] Mr. Lamb: I object. That calls for a conclusion—

The Witness: I don't think so.

The Court: Overruled. What was the answer?

The Reporter: "I don't think so."

By Mr. Alioto:

Q. You mean that an independent like the Utah Pie Company is better off with a $2.16 price as against a $2.32 price by Pet-Ritz?

A. I don't know what their costs are. And they would vary by area, would they not?

Q. Regardless of what the costs are, isn't it perfectly clear that the Utah Pie Company would be better off competitively if it had to compete against the California price, which was 32 cents a dozen higher than the Salt Lake City price, which was 32 cents a dozen lower? Isn't it obvious—

A. There isn't any question about that.

Q. Surely.

A. It would be better if it was $2.80.

Q. Obviously. So that that difference in price does make a competitive difference, doesn't it, to the independent located in the area where the price is lower?

A. Yes.

Q. Just one last subject matter. You said, in connection with the Swiss Miss—now, Swiss Miss is an economy pie of 20-ounces that you put on the market sometime in 1960?

A. That's correct.

Q. Was it the purpose of Swiss Miss to compete against the national pie labels, or was it the purpose of Swiss Miss to compete against the regional pies?

A. It was to compete against the national at the economy level, wherever they happened to fall. To get that substantial—

Q. Did I misunderstand you this morning to say in your narrative answer to Mr. Lamb's question, did I misunderstand you when I thought you said that Swiss Miss mainly competes with the regional pies?

A. It falls in that, but it was not—it was designed to compete in the economy segment of the U. S. pie market that existed at that point in time when we made the decision, which I think started in mid '59, when we determined that we were going to go in. And then it took us that long to move into it, which was in 1960.

Q. I don't think, with deference, Mr. Harsha, that I have an answer to my question. Did you testify this morning under Mr. Lamb's questioning that Swiss Miss mainly competes with the regional pies?

[fol. 967] A. It competes with the economy price, which generally speaking are the regional pies.

Q. Okay.

A. And I think that's exactly what I—

Q. And I take it that the Utah Pie, or the pies of the Utah Pie Company, would come under that definition of the regional pie, as distinguished from Simple Simon, for example?

A. That's correct.

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Shelby A. Robert, Jr. called as a witness on behalf of the Defendant Pet, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lamb:

* * * * * * *

Q. Mr. Robert, I show you Plaintiff's Exhibit No. 61 and ask you what that is?

[fol. 968] A. That is a report—this a report prepared by Market Research Corporation of America, presented to us in September, 1959, on the frozen pie market.

Q. What was this study done for?

A. To give us a description of what the situation of the market was from a period from July of 1958 through August of 1959 and to assist in determining whether we should go into a second brand of pies.

Q. Did you do any other research with regard to a second brand of pie?

A. Not formal research. We did a great deal of other economic investigation, looking into the pie business, but nothing of a formal nature.

Q. Did you ever transmit a copy of this report to any employee in the Continental Baking Company?

A. No, sir.

Q. Did you ever transmit a copy of this report to any employee of the Carnation Company?

A. No, sir.

* * * * * * *

[fol. 969] Mr. Alioto: 123 was not formally received in evidence. We ask it be received at this time, that being the Pet invoices for Utah and California between January and June of 1961 of the Swiss Miss label.

Mr. Lamb: No objection, your Honor.

The Court: Received.

(The document marked Plaintiff's Exhibit 123 for identification was received in evidence.)

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[fol. 970] Roice H. Anderson called as a witness on behalf of Defendant Pet, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Will you state your name and address.

A. Roice H. Anderson, 1775 North 12th East, Logan, Utah.

Mr. Lamb: Can you hear? Can you hear the witness?

The Court: I can hear all right. The witness doesn't make enough noise. Will you lift your voice.

By Mr. Lamb:

Q. Dr. Anderson, will you give the Court and jury the benefit of your chronological—the chronological order of your educational background?

A. I received my Ph. D degree in Agricultural Economics in 1943, became assistant professor at the University of Wyoming, doing research and teaching in agriculture, economics, and marketing; went into the Service for two years, in the Navy; came out of the Navy in 1945 and went back to the University of Wyoming—excuse me, that was in 1946. Went back to the University of Wyoming for one year, and then moved to Utah State University in September, 1947, and I have been there since that time in the department of agriculture, economics and marketing, doing primarily research in the field of agricultural marketing.

Q. Will you give us some idea of your training and experience in making marketing studies?

A. About two-thirds, on an average, over this period of time; about two-thirds of my time has been spent in doing research work, collecting data from marketing agencies, in some cases from farmers, concerning marketing problems dealing primarily with agricultural products.

Q. And how long have you been doing this?

A. Well, since 1943, with the exception of two years out for the Service.

Q. Will you identify for us Dr. Lambourne?

A. Dr. Lambourne is a professor at the University of—Utah State University. He also received his training in agricultural economics and marketing, received his Ph. D degree from Cornell University. I think the year was 1947, if I am not mistaken. And he went directly from Cornell to Utah State University in that year, 1947, and since that time has been associated there with the exception of two years when he was back East, somewhere in Michi-

gan, I think, at a small college there, for about two years' time.

[fol. 971] Q. Dr. Anderson, were you and Dr. Lambourne engaged by the defendants in this case to make a marketing study of frozen pies in the Intermountain area?

A. We were.

* * * * * * *

A. We were asked—

By Mr. Lamb:

Q. Was your compensation contingent upon the outcome of what the study might show?

A. No, it was not.

Q. Were you given full freedom to make this study without interference by the defendants?

A. Yes, we were.

Q. Were you given any instructions by the defendants as to how to proceed?

A. No, except some general indications, since this is a new field for us, the specific area; they indicated at the outset some of the manufacturing firms and the wholesalers in the market. We were concerned with how big a job this was and about how many people involved, so some indication of this was given before we started.

Q. Will you explain to the Court and the jury the manner in which you went about making this study?

A. We obtained information from the buyers of fruit pies in the Intermountain market, wholesale buyers. We discovered early that there were a relatively small number of large buyers and that the purchases were rather large, so that we immediately decided that there was no point in sampling either the firms or the invoices or the data which we obtained, so we set about to get 100 per cent compilation of the pie purchases in the Intermountain market. Of course, we knew full well that there would be some out of business, and so on, that would be impossible to obtain, but this was our goal, to get 100 per cent, and

we did get our information from the buyers of the family size pies, fruit pies, including mince and pumpkin. We were asked to get information on all fruit pies. We had the six flavors, plus "all other" which included blueberry, pineapple, apricot, and such, a very small number.

Q. What years was this study to cover?

A. We were asked to make the study covering the years 1958 through 1961, and we did this on a calendar-year basis for those four years.

Q. Dr. Anderson, I show you Defendant Pet's Exhibit A-35 for identification and ask you what that is?

A. This is the report that we have made from our market shares study.

[fol. 972] Q. This report covers—will you state for the Court and the jury what it covers?

A. It covers, for each of the four years, the brands being sold in the market, or I should say, perhaps, that were purchased by wholesalers in the market, including Carnation, or Simple Simon, Merton, Utah Pie, Bel Air made by Utah Pie, Frost 'N' Flame, Mayfresh, Swiss Miss, Pet-Ritz, Bel Air made by Pet Milk, and all other brands that were in the market. These are those that sold the minor quantities throughout this period. And that is for the year 1958, 1959, 1960, and 1961. These are all broken down by flavor and then by total. Then, in addition, we collected—in addition to the quantities of pies, we collected price information from the invoices as we obtained the data from the wholesalers. This was the amount paid by the buyer. In other words, it would include all off-invoice prices. We took actually the quantities of pies on the invoice and the total money paid by the firm, and then we—used over a period of one month of the shortest period we were concerned with. So that we didn't deal with individual—in our analysis and our summary we didn't deal with individual invoices, but rather monthly averages for the buyer, which means we took all of their purchases for the month, total money they paid for pie, and made up a working card then with the average price

paid for that month. And so we did summarize these prices as well into a report, which really represents the average monthly price for each buyer. And if there was more than one buyer of a given brand and flavor, we reported two things: We reported the highest price and the lowest price, or the range in prices, and then we reported the median of these prices, of these monthly average wholesale prices.

We wanted some measure of central tendency. Our design here was to merely show general levels of price between brands and the trends in these levels, except in the printed report we did show these extremes as well, the high and the low, but we selected the median as representing the general level of price.

And these are reported again for each brand by flavor for the four-year period.

Q. Now, Dr. Lambourne—I mean Dr. Anderson, I direct your attention to Page 15 of the study, which purports to be prices of the Morton Company, and I specifically direct your attention to some changes that have been made in this document in ink for 1961.

[fol. 973] Now, will you please tell the Court and the jury what those changes were— Well, first of all, was this report in error with respect to the $2.61 price as it appears opposite No. 7 here?

A. Yes. We have consistent—or continually been checking this study against evidence as it has been found by us to be more accurate than what we did have. We have changed the quantity figures on one or two occasions, but only when we could go to our original source and find that we were in error. And we found one price here that was for the Morton Company. We had, as a range of prices, $1.28—these are prices per case, per six-pie case—and here you will appreciate the problem that some of these pies come in 12-pie cases and some come in 6-pie cases. And we were changing these to six-pie cases. We had a range in prices from $1.28 to $2.61. We should have been

able to see that this was the price on the dozens, the price per dozen, instead of six-pie case, because it is just about double the one price. And in checking this one invoice we went back and got hold of the invoice, and we found we had made an error of getting the number of cases instead of the number of dozens here, so our price had to be reduced to the 6-pie case size.

Then, in addition to this, we have learned and were told—in fact, I shouldn't say we were told; we saw an invoice that was submitted in evidence that indicated that the Morton Company, beginning at that month, made sales in this area on an f.o.b. Watsonville price with a 30-cent freight allowance per dozen, per dozen pie case. So we had added 15 cents for freight allowance to the prices for those two months, July and December, the only two months that we had data from Morton Company, which means that we have a corrected price in here now of $1.43 to $1.45 per case, with a median of $1.44. This is for July. And for December, $1.52, which is 15 cents above our $1.37, which we obtained from the invoice, which had this one allowance.

Now, we made this correction in order to make Morton's prices comparable with other companies and brands which were sold on a delivered basis.

Those are the corrections in our report.

Mr. Lamb: If your Honor please, I offer Defendant Pet's Exhibit A-35 in evidence.

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[fol. 974] Voir dire examination.

By Mr. Alioto:

Q. Maybe we can reach it in this fashion: Originally you had a Morton—Dr. Anderson, will you be good enough to help me on this. Originally you had a Morton price range of 1.28 to 2.61?

A. Yes.

Q. That is correct, is it not?

A. That is correct.

Q. It is quite understandable, Dr. Anderson, that the 2.61 should have been dozens instead of cases, and therefore it was exactly double?

A. Right.

Q. Wasn't it?

A. Right.

Q. So if you simply cut that in half, you would have a price range then of 1.28 and 1.30½, isn't that correct?

A. Right.

Q. 1.28 and 1.30½. Now, then, by your adding the 15 cents to make it 1.43, that 15 cents came from a source outside of the original source that you used, namely, the Wholesale Grocers, that is correct, is it not?

A. Yes—I saw the receipt—I mean, I saw an invoice with this kind of a freight allowance on it. It's the only firm that apparently priced their pie on this basis. So I thought it justified to make this allowance so that it would be comparable with the other firms in the study.

Q. Don't you actually recall, Dr. Anderson—and this, too, could be difficult; I am not suggesting it isn't—don't you actually recall that the invoice you looked at showed the freight prepaid, "ppd" in the corner of it?

[fol. 975] A. Well, I can't go back to that original invoice.

Q. Well, where is the original source from which you took the information on the 1.28, for example, that you have now changed to 1.43?

A. We were not—we didn't pick the invoices up from these firms, but copied those invoices onto a work sheet of ours, so when we got back in the office, we had the work sheet indicating the 1.28, and we can track that down as our basic source. But to get the invoice, we would have to go back to the wholesaler.

Q. Well, then, if your work sheet showed 1.28 for Morton, that means that this is the way you took it off the invoice?

A. This is right.

Q. Then that means, does it not, that you made the change from 1.28 up to 1.43 because some lawyer suggested it to you, isn't that what it means?

A. On the basis of an invoice that I saw for sales in this area with this 30-cent freight allowance.

Q. Did some lawyer suggest that you make this change from 1.28 to 1.43?

A. Yes.

Q. What is the name of the lawyer who suggested that?

A. Mr. Schafer.

Mr. Alioto: With that understanding, if your Honor please, we will let it go in. This is an example of—

Mr. Schafer: May I ask one or two questions voir dire, your Honor?

The Court: Yes.

Voir dire examination.

By Mr. Schafer:

Q. What was the purpose of this study, Dr. Anderson?

A. The original purpose for the study was to find the shares of—

Q. I am talking about the price study.

A. The price study, we were instructed to get information on both quantities and price, and when we come to analyzing the price data it was merely to show the general levels and trends of prices among these firms. And as far as our purpose was concerned, it seems to me we have got to disregard the extremes and come up with some general level representing each of the brands.

[fol. 976] Q. Do I correctly understand that except for this $1.28 quotation that you had when you report it originally, that every other price that you quote in your report is an f.o.b. Salt Lake City price?

A. This is as far as we know. We got what the wholesaler paid, and we have no way of knowing if there were

other billbacks of any kind or if he was buying it and paying the freight in addition. We took it right from the invoice, and the invoice price that he paid, and we had no way to know whether he paid it on a freight delivered or f.o.b. plant.

Q. So you don't know whether or not your other prices are sales in California or sales here?

A. No, we don't.

Q. Do you have any reason to believe that any of the others are?

The Court: He says he doesn't know.

By Mr. Schafer:

Q. In your judgment, Dr. Anderson, in developing your price comparison study, can you validly compare a price in Salt Lake City as against a price in California?

Mr. Alioto: I don't think this is voir dire examination of anything, your Honor.

The Court: No. It isn't.

Mr. Alioto: Object on that ground.

Mr. Lamb: If your Honor please, may the document be received evidence?

Mr. Alioto: Subject to what's been said, if your Honor please, I have no objection to the jury or anybody else looking at it. We won't object.

The Court: It's received.

(The exhibit marked Defendant Pet's Exhibit No. A-35 for identification was received in evidence.)

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[fol. 977] (The exhibit marked Defendant Pet's Exhibit No. A-36 for identification was received in evidence.)

By Mr. Lamb:

Q. Dr. Anderson, I show you Defendant Pet's Exhibit A-37 and ask you to tell me what that is.

A. It's the same as the other, except for one flavor only, apple pie flavor, by brands, for the four years.

Mr. Lamb: Mr. Alioto, do you want to see this?

Mr. Alioto: Is that also the same as the one in the study itself, but just blown up?

Mr. Lamb: That's correct.

Mr. Alioto: We have no objection.

Mr. Lamb: I offer it in evidence, your Honor.

The Court: Received.

(The exhibit marked Defendent Pet's Exhibit No. A-37 for identification was received in evidence.)

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[fol. 978] By Mr. Lamb:

Q. Dr. Anderson, I show you Defendant Pet's Exhibit A-38 for identification and ask you to tell me what that is.

A. These are the Pet prices as obtained from our report, these median prices paid by wholesalers for 8-inch frozen apple pie only—this is for apple—by brand for the four-year period plotted by months.

Q. Who prepared this chart?

A. I prepared this chart.

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Voir dire examination.

By Mr. Alioto:

Q. Tell me what prices are supposed to be represented [fol. 979] here for the Morton Company in July of 1961. I don't understand those markings. What prices are supposed to be represented by Morton Company?

A. That's the prices indicated on the price sheet that was indicated. This price with the adjustment for this freight allowance.

Q. In other words, you're showing the $1.43 price, instead of the $1.28 price that you first had down there, and which you got off the books of the wholesaler; is that correct?

A. I got off the—yes. I'm putting the corrected price, so they will be comparable with the other—

The Court: Well—

Mr. Alioto: I'm going to object, if your Honor please, to the introduction of so visual and graphic a book, which is against his very study and in which he finally winds up putting a figure that a lawyer gives him, outside of his study.

Mr. Schafer: I think that's inaccurate.

The Court: I don't think it's inaccurate.

Mr. Schafer: The facts will show that Dr. Anderson checked all the invoices.

The Court: Objection sustained.

Mr. Lamb: If your Honor please, may we offer this in evidence with that exception?

Mr. Alioto: I don't know how you can offer that without exception, unless you take it off. I have no objection—

The Court: Well, let me excuse the jury for a few minutes. You haven't been out since 2:00 anyway. So don't talk about the case.

(Here the jury was dismissed from the courtroom.)

The Court: Now in the first place, Mr. Lamb, you're in difficulty with that $1.28 and $1.43 price. But your offer of the exhibit for the balance, excluding this, is bad, because your accountant who prepared this thing on Mr. Schafer's request said he didn't know whether the others were right, either. That's what he said. He said he didn't know.

[fol. 980] Mr. Lamb: I didn't recall that that statement had been made. May I ask Dr. Anderson a question, your Honor?

The Court: Sure.

By Mr. Lamb:

Q. Dr. Anderson, will you state to the Court what this study is?

A. The study is a price—are the prices taken from the invoices of the wholesale buyers of pies.

Q. Can you vouch for the accuracy of the figures that were taken from those invoices?

A. Yes, I can vouch for the accuracy of the data taken, but I don't have any—if I may just add this explanation—I don't have any way of knowing whether they're delivered or f.o.b. plant. These are the invoice prices paid by the wholesalers.

If those invoice prices show delivered prices, that's what we got. And it was only in this Morton's case that we made any adjustment for delivered price, and I assumed the other prices were delivered prices, but I can't vouch for this a hundred per cent.

Q In the case of Pet Milk Company, Dr. Anderson, were you furnished certain invoices that you were unable to obtain through certain wholesalers in order to further check the accuracy of your study?

A. Yes. We had an I.B.M. study from Pet Milk to check our total sales against.

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COLLOQUY BETWEEN COURT AND COUNSEL

[fol. 983] Mr. Alioto: Now, the only objection I have to this document, it doesn't actually show the net of anything; and that difficulty is not so horrible as counsel says it is, if they really wanted it done, with all the statistical help that they have. The difficulty I have is this. When I first got this, if your Honor please, we had attached to this study a map which showed the Frost 'N' Flame as the lowest in the market. And it shows Morton jumping in July of '61 from close to the lowest to a very high point.

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[fol. 984] And then the witness tells me for the very first time that his study is done on one basis—namely, invoices, except for one thing that Mr. Schafer tells him to change.

I submit that the witness's study showed $1.28, and it should show one-half of $2.61.

The invoices he looked at—I take it he looked at the Grocers Wholesale Company in Salt Lake City—and Safeway and Utah Wholesale—the invoice he looks at shows a $2.55 price, with the prepaid mark in the corner, on a grocers' wholesale, and an allowance of $1.45 is what's actually shown there. $2.55. Now, if the study is going to be consistent, he would have both prices on it, and then this map would show what we believe the truth to be, that the lowest price in this market is that Morton price of July of 1961. As they have now corrected it, the Frost 'N' Flame appears as the lowest price on the market.

Now, I say, if your Honor please, that Dr. Anderson should be let alone and should not make a change at the last minute because Mr. Schafer tells him to make a change.

Where his statement is an oral statement of Mr. Schafer's, as distinguished from the wholesaler's invoices that he looked at—

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[fol. 985] Mr. Schafer: ' Sir, I'm concerned about the inferences that have been made that I have asked the witness in any way to twist his testimony or falsify the facts or anything else. I told the witness this morning that, as I understood his graph, it was intended to be a report of Salt Lake City prices. I said that, in my view of the matter, he was free to make his own decision, but in my view of the matter, to compare a California price against a Morton—against the rest of the market in Salt Lake City—was to compare apples and oranges.

He said to me, "I took this off the invoices." I said, "I'm sure you did, but the invoices don't break down the different allowances between freight and other."

And he said: "Well, have you got any proof? You had a thirty cent freight allowance, and your delivered price was $2.85."

[fol. 986] So I went down to my room in the hotel and got all my invoices and brought them up to the witness and showed them to him; and he examined these invoices, and he examined plaintiff's exhibit, I think it is 15 in evi-

dence, which is the Safeway quotation. And he satisfied himself that he was in fact comparing apples and oranges, and in order to compare oranges and oranges, he'd have to change the—take the freight allowance out of the delivered price here in Salt Lake City. And that's what he did, but he didn't do it on my say so. He did it only after reviewing all of the documents that are relevant to the matter. And I didn't force him to it and order him to, or anything else, and I think it's a little bit unfair to me and to the witness to permit Mr. Alioto to infer to the jury that I have asked the witness or that he has agreed to twist his testimony, your Honor.

The Court: Well, the witness said—

Mr. Alioto: He said it.

The Court: The witness said you asked him to do it.

Mr. Schafer: That's right, I did. But he didn't do it, your Honor—

The Court: The witness said, "Mr. Alioto, didn't the attorney tell you to change that from $1.28 to $1.43"?

And the witness said yes, he did.

Mr. Schafer: But, your Honor, the point—

The Court: Mr. Alioto said, "Who was it?" And he said, "Mr. Schafer."

Mr. Schafer: Sure, no question about that.

The Court: That's the sworn testimony of the witness.

Mr. Schafer: No question. But, your Honor, he didn't take my say so for it. He reviewed all the evidence; and it was only after reviewing the evidence that he did make the change. And, of course, there's no intent or attempt to hide anything here. These changes are all over the document. Mr. Lamb brought it out on his own volition. So there's no thought of hiding any facts.

[fol. 987] The Court: What we're talking about, Mr. Schafer, is we've had some voir dire examination about this document now, rather extensive. And it appears to me that its sources are impeached, and the method is impeached, the method of preparing it. He didn't satisfy himself whether those invoices were f.o.b. or delivered.

Mr. Schafer: If it please the Court, I was only addressing myself to the question of—I didn't want your Honor to think that I had asked the witness to falsify any testimony or any evidence or anything else.

The Court: I'm sure you didn't ask anybody to falsify it, but you fixed up the exhibit.

Mr. Schafer: Well, I didn't ask him to do that on my say so. I said: "Look at the documents, and see if you shouldn't be comparing apples with apples."

Mr. Alioto: The document shows a $2.55 delivered price, as you know. Now, you say that—

Mr. Schafer: The testimony is all over the record, Mr. Alioto, that that's wrong. Mr. Hereford testifies it's wrong, Mr. Degenhardt testifies it's wrong, Mr. Henzke testifies it's wrong.

The Court: Now, I've let you talk, Mr. Schafer. Let's hear from Mr. Alioto.

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[fol. 988] Voir dire examination.

By Mr. Alioto:

Q. Dr. Anderson, you see Plaintiff's Exhibit 14 in this case?

A. Right.

[fol. 989] Q. You see that 2.55 price?

A. Right.

Q. You see this "prepaid" in the corner?

A. Yes.

Q. Now, if you did exactly what you did with everybody else, with every other company, with every other invoice, you would have shown a 1.275 price on your exhibit wouldn't you?

A Right.

Q. And then you would also have shown it on your map, is that correct?

A. Right.

Q. And the only reason you didn't show it on your map was because Mr. Schafer asked you not to, isn't that correct?

A. He did present the evidence of this exhibit that was put in that indicated a different invoice than this one that did show a freight allowance of 30 cents.

Q. Did you see this one?

A. No.

Q. You mean Mr. Schafer didn't show you the one in evidence that had a 2.55 price?

Mr. Schafer: I showed him the whole bunch.

Mr. Alioto: Apparently you didn't. He just said you didn't.

Mr. Schafer: Mr. Alioto, the testimony is clear that that is a typographical error.

The Court: Just a minute, Mr. Schafer. Let's get the testimony of the witness.

By Mr. Alioto:

Q. Did you see Exhibit 14 in evidence in this case at any moment until the time I have just shown to you?

A. No.

Mr. Alioto: That is what I mean, if your Honor please, giving him half a document.

Mr. Schafer: There is no question but that when he made the chart up he had those kinds of documents. He had documents which showed 2.55.

Mr. Alioto: Why didn't you show him this one?

Mr. Schafer: Because I didn't have to. He had those when he drew the first schedule up.

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[fol. 992] By Mr. Alioto:

Q. Did you ask the Morton Company to supply you all of their invoices when you were making their study?

A. No, not all of them. There was two firms in the market—I should have perhaps explained this in some further detail when I was explaining the study. There was AG Food Store in Salt Lake, who, when we went to get their invoices from them, they were very cooperative, but when we come to get them, they didn't have them; they had lost their invoices, except for their invoices for Utah Pie Company. And we proceeded in the same manner as we had in the others to get the invoices for Utah Pie, but were required to get from the defendants in the case information from their own invoices, and they sent us this. This is one deviation.

The second was with Albertson's Food Company, Albertson Food Stores. They, because of their methods of bookkeeping—they microfilm all their data and not have them indexed in a way that you can get at them—we used invoices from the three defendants and from Utah Pie for that company. We used Zimmerman's audit for that one company. So these were put in in lieu of getting invoices from all of the wholesalers.

Q. Now, did you specifically ask the Continental Baking Company to send you their invoices?

A. For those two companies.

Q. Yes.

A. For Albertson's and for AG.

Q. And did they send them to you?

A. No.

Q. Why not? Mr. Schafer refused to send them, didn't he?

Mr. Schafer: I don't think we had any.

[fol. 993] By Mr. Alioto:

Q. Didn't Mr. Schafer refuse to send you his invoices?

A. He sent the information on a wire. That is all the information I had.

Q. On a wire. And you asked for the invoices, though? One of those invoices would have shown Associated Food

Stores in Salt Lake City, which in Exhibit 14—one of those invoices would have shown the price of 2.55? I am handing it to you. Isn't that correct?

A. That's what it says on there.

Q. That's what it says on there.

A. Cocoanut.

Q. Yes. Cocoanut pie at 2.55.

A. We didn't use cocoanut pie.

Q. And here is an apple pie invoice, an apple pie for 2.55.

A. Okay.

Q. Prepaid. That's correct, is it not?

A. Right.

Q. And Mr. Schafer refused to send you the invoices, didn't he?

Mr. Schafer: For Associated?

A. He didn't send them.

Q. He didn't send them.

A. He sent me a wire with the information.

Q. Didn't you get the information from some source, whatever it was, that Mr. Schafer had said he would not send his invoices?

A. He didn't tell me he would not send them. We relied on the defendants to get the invoices to them, and Mr. Thatcher made all the inquiry to the three defendants to send the invoices to me. I didn't make the request. I assumed the defendants would send their invoices at his request.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Alioto: If your Honor please, unless this 2.55 price is put on this map, we are going to object to it, as a doctored deal.

Mr. Lamb: If your Honor please, that is a terrific penalty for the Pet Milk Company to suffer, and that is one of the great problems—

The Court: Why can't you have that thing fixed up with the 2.55 on it. That is the invoice.

Mr. Schafer: Well, your Honor, may I say something to that?

The Court: Yes.

Mr. Schafer: Or am I interrupting?

[fol. 994] The Court: Certainly, go ahead.

Mr. Schafer: The evidence in this record is replete with the fact that you had a 2.85 price here, or a 2.55 price in California. Mr. Alioto's own exhibit shows that. And it seems to me you cannot permit the jury to think you had a 2.55 price in Salt Lake City in the face of all the evidence.

Mr. Alioto: This is the evidence, isn't it, right here?

Mr. Schafer: No. The evidence is that this is a mistake by an IBM clerk in Rye, New York.

The Court: There is no evidence that that is a mistake.

Mr. Schafer: Mr. Hereford testified it was, your Honor.

Mr. Alioto: Mr. Hereford, who didn't know anything about it, from Rye, New York.

Mr. Schafer: He knew a lot about it from Rye, New York. The Safeway offer, your Honor.

The Court: How did we let that in?

Mr. Schafer: It is in.

Mr. Alioto: Yes.

Mr. Schafer: It is in. And the Safeway offer, which is Plaintiff's Exhibit 15—

The Court: How could Mr. Hereford, who didn't have anything to do with that, tell us that that was a mistake?

Mr. Schafer: He is in charge of that department.

The Court: Yes, but how does he know this is a mistake?

Mr. Schafer: Well, he knows what the prices were.

The Court: Oh, well—

Mr. Alioto: That is different.

[fol. 995] The Court: If there is any testimony like that in this record, it shouldn't be in here.

Mr. Schafer: Now, your Honor, the Safeway offer, which Mr. Alioto put in evidence, which is Plaintiff's Exhibit 15,

that Mr. Chapman wrote out and offered it to Safeway as the price, clearly shows on its face that this is the price.

The Court: I want to see the transcript—I am talking to the reporters now—I want to see the transcript where Mr. Hereford talked to this point. It sounds to me like there is something in here that shouldn't be in.

Mr. Schafer: Your Honor, could we adjust ourselves a moment to this offer to Safeway Stores, which is Plaintiff's Exhibit 15, that clearly shows—

Mr. Alioto: Are you going to resolve a factual issue that is for the jury right now? Is that what you are going to do?

Mr. Schafer: It cannot be for the jury. This is clear on its face.

Mr. Alioto: In the light of this invoice it can't be for the jury? 2.55? You think they made a mistake?

Mr. Schafer: I submit it cannot be. It is a 2.55 price in California, your Honor.

The Court: I will take the position right now that if you have that kind of a controversy, of course it is for the jury.

Mr. Schafer: Your Honor, may I remind you that Mr. Gaylen Rigby himself testified that it was a 2.55 price in California he had to meet, and he testified he had to come down to 2.75 to meet that price.

Mr. Alioto: Is there some reason why you didn't send him the invoices and—

Mr. Schafer: No, there was no reason. He was in a hurry and I sent him a telegram.

The Court: All right, I have heard all the argument on this I am going to hear.

[fol. 996] Mr. Alioto: We submit, if your Honor please, without that 2.55 price on that we think it is a slanted exhibit and I object to it.

Mr. Lamb: If we bring this back without Morton on it, will you accept it for Pet?

Mr. Schafer: No, I think Morton should be on it.

Mr. Alioto: If you will bring it with Morton's 2.55 price on it, I will accept it.

Mr. Schafer: F.o.b. California.

Mr. Alioto: It isn't f.o.b. California according to this exhibit.

Mr. Schafer: Do you want to see your Plaintiff's Exhibit 15?

Mr. Alioto: Do you want to see your own exhibit?

The Court: All right, gentlemen, I am not going to keep that jury waiting out there in order to have you fellows hassling over this.

Apparently my ruling isn't going to satisfy anybody. I can't put both Morton's view and the plaintiff's view on that thing, and if I let you put in everything except this thing that is in controversy, both of them are going to be upset about it.

I think that exhibit is not admissable on the basis: (1) that the 1.28 was lifted up to 1.43 by advice from Mr. Schafer, which was outside and beyond the material that the thing was supposed to have been based upon, really. And I am not throwing any rocks at Mr. Schafer and certainly not at the accountant. This voir dire was designed to get at the proposition of what were the sources of this and were those sources reliable.

Now, I think the 1.28 figure on there is not reliable.

Now, we can't receive the rest of it either because this witness testifies that he doesn't know, he wasn't informed, and couldn't vouch for whether these figures were f.o.b. Watsonville or whether they were delivered prices. So we have the man who prepared the exhibit saying he doesn't know whether the basis of it is sound or not. And on that basis I sustain the objection and exclude the exhibit.

[fol. 997] Now, are you ready to proceed? We will call in the jury.

Mr. Lamb: Yes, your Honor.

The Court: Call in the jury.

Mr. Lamb: Yes, your Honor.

The Court: There is a way to fix that exhibit up, of course. You fellows ought to work on that.

* * * * * * * *

[fol. 998] Direct examination.

By Mr. Lamb (continued):

Q. Dr. Anderson, as a result of your study did you find any evidence of methods used by the various companies to increase or maintain their positions in the market?

Mr. Alioto: I submit, if your Honor please, that Dr. Anderson just made a statistical study and is certainly not competent to testify on competitive methods in the business world, in the market place.

The Court: Read the question. I didn't get the question.

Mr. Lamb: First of all, may I say, your Honor, that I qualified Dr. Anderson as an expert in this area. He is an economist.

The Court: All right, let's hear the question.

By Mr. Lamb:

Q. Dr. Anderson, as a result of your study did you find any evidence of methods used by the various companies to increase or maintain their position in the market?

Mr. Alioto: If your Honor please—

A. Yes, I did.

Mr. Alioto: I submit, if your Honor please—okay. Yes, he did.

The Court: Now, you hold your answer, Dr. Anderson, to give counsel an opportunity to object. Go ahead, Mr. Lamb.

By Mr. Lamb:

Q. What were the methods that you found?

Mr. Alioto: If your Honor please, he is asking this witness to testify as to what was done in the market place to secure business. It seems to me it is wholly beyond any foundation that he had laid for this witness, wholly.

The Court: Why isn't that so?

Mr. Lamb: Your Honor, the forces of competition and monopoly are forces that are reflected by certain activity in the market place.

[fol. 999] The Court: But he didn't get the evidence of the activity. That is what we were just discussing while the jury was out. That evidence was not before him.

Mr. Lamb: Well, your Honor, I gathered that insofar as the Plaintiff's Exhibit A-35, which is in evidence, and to which I am now addressing myself, was competent, upon which I could ask questions, the exhibit that was not received was a chart identified as Defendant Pet's Exhibit A-38.

Now, the data which was collected by Dr. Anderson is contained in A-35. And my questioning to him will be directed toward the factual data contained in that document.

Mr. Alioto: I have no objection to any questions directed toward the factual data, as he says, contained in that document. What I am objecting to is attempting to qualify Dr. Anderson as an expert on competitive forces in the market place, when he doesn't know whether prices are delivered or f.o.b., when he doesn't know the cost of production, when he doesn't know whether these companies have lost money in the business, when he doesn't know whether the companies have a two-price system; all of these things a man like Mr. Gamble, for example, would know. But certainly Dr. Anderson doesn't know those things. And, therefore, to qualify him as an expert in the market place, I submit, is not justified in this record, and perhaps Dr. Anderson would be the first to admit that.

Mr. Lamb: Your Honor, in antitrust cases, the use of experts in marketing and economics have become almost universal in order to assist the Court and the jury to understand the complexities of the market place.

The Court: Oh, well, we're not talking about the complexities of the market place. We are talking about a very

specific problem we're trying in this lawsuit. And it just seems to me there is a lot of data that Dr. Anderson doesn't have.

We usually examine an expert on a subject like this by stating to him what is in the record, and then letting him draw a conclusion. But that isn't what you're doing.

Mr. Lamb: Well, your Honor, this exhibit is—

The Court: I don't know how you could state that hypothetical question, really, in this lawsuit.

[fol. 1000] Mr. Lamb: Your Honor, this is in evidence, A-35 is in evidence.

The Court: But that isn't all the evidence. If you're going to have an expert testify in a local lawsuit—a medical case is a good example of that. You state what the evidence shows, and then ask him his opinion about it.

Anyway, I'm not clear that Dr. Anderson has been qualified; but assuming he has been qualified, I think that he doesn't have all the information before him from which to express an opinion that has any relevancy in this case, because we're talking about this one, not the market place in general.

Mr. Lamb: Yes. We are talking about this case; and the market share information which has been received in evidence is as perfect a schedule as could possibly be otbained, and it's been testified to that this represents 85 per cent. Now, the questions that I am about to ask Dr. Anderson are questions that relate to that data, and it's the best evidence that we have, your Honor.

Mr. Alioto: I suggest that counsel asks the specific questions. But he's not asking how the plaintiff got a certain position in the market and how Morton got a certain position in the market; and obviously that question is beyond the qualifications of the witness.

Mr. Lamb: May I ask—

The Court: I'm going to sustain the objection to this question, and I'm not going to preclude you from attempting to develop it in another way.

By Mr. Lamb:

Q. Dr. Anderson, did you reach any conclusions as a result of the studies you made of this market?

A. I did.

Q. Now, can you state some of those conclusions for the Court and the jury?

Mr. Alioto: If they're conclusions relating to the competitive market place, if your Honor please, and how companies obtain certain shares of the market at a given time, I'll object to them. There's no qualification shown.

Mr. Lamb: Well, your Honor, I'll try it another way.

[fol. 1001] The Court: I'll sustain that objection.

By Mr. Lamb:

Q. I'll try it another way. Dr. Anderson, how many frozen pie firms did you find in the market in 1958?

A. Seven.

Q. And how many brands were in the market in 1958?

A. Seven.

Q. How many firms did you find in 1959?

A. There were still seven.

Q. And how many brands?

A. One additional brand. There was eight.

Q. And in 1960, how many firms did you find in the market?

A. I found nine.

Q. And how many brands?

A. Twelve.

Q. And in 1961, how many firms did you find?

A. There was—reduced down to eight, again, in '61.

* * * * * * *

By Mr. Lamb:

Q. Did you tabulate the respective number of dozens of frozen fruit pies for each of the defendants and the plaintiff and for a category listed as "All Other"?

A. Yes, I did.

Q. Did you observe the changes that took place from one year to another?

A. Yes.

Q. Did you reach any conclusions with respect to the competitive activity in this market place as a result of the examination of those statistics?

[fol. 1002] Mr. Alioto: That's objected to, if your Honor please, because an examination of the invoices when the witness doesn't even know whether they're delivered prices or f.o.b. prices cannot be an expert foundation for the reaching of conclusions relating to competitive market activity. It's that clear, I think. Objected to on that ground.

Mr. Lamb: Your Honor, with relation to the Pet Milk Company, that's not so. The invoices were checked. He has the data. And insofar as this complaint is concerned, it is joint and several, and if it is necessary, Your Honor, to limit my questions to Dr. Anderson in relation to the activity of the Pet Milk Company versus the plaintiff, I shall be very happy to do that.

Mr. Alioto: I'm talking about that specific question. It doesn't make any difference whether he knows about the Pet invoices. The specific question seeks to elicit a conclusion or an opinion of this witness as to why certain competitive changes took place; and I say that there is nothing in the qualification of this witness that justifies him to give that conclusion to the jury. He's talking about market place activity, such as Mr. Harsha, Mr. Gamble, the witness—Mr. Gaylen Rigby—those people might know. But to simply ask a man who has looked at invoices—and not all the invoices—in the case of Morton, all he looked at was a telegram from Mr. Schafer—to ask that man to tell why competitive things happen, if your Honor please, is beyond any qualification in this record.

The Court: I think so. The objection will be sustained.

By Mr. Lamb:

Q. Dr. Andersen, what percentage of the total fruit pie market is represented by your study?

A. Based on checks that we made from both the audit made by Mr. Zimmerman and information supplied by Carnation and by Pet Milk Company, our study includes 85 to 90 per cent of the total market during those four years.

Q. Dr. Anderson, will you give me your professional opinion as to whether or not that is an adequate sample from which you as an expert economist can draw certain conclusions?

A. It is.

Q. Now, Dr. Anderson, will you give us your professional opinion as to whether or not the frozen fruit pie market in the Intermountain area was marked by competition?

A. Yes, sir. It was marked by competition.

Mr. Alioto: That's objected to—excuse me. I'll make a motion to strike the answer.

[fol. 1003] The Court: The answer is stricken.

Mr. Alioto: That's objected to on the ground it calls for the ultimate conclusion to be made by the jury on a competitive matter about which this witness cannot possibly be advised. Now, there's one obvious reason that counsel knows about. Certain prices are given here by Dr. Anderson that don't represent the prices at all. As everybody knows, they represent what's on the invoice. And whatever they got back by way of rebates, by way of allowances, or anything else, Dr. Anderson has absolutely no knowledge about. Now, how could a man be asked a question of competition or competitive factors, when he doesn't even know that simple matter?

Mr. Lamb: If your Honor please, I can fully appreciate Mr. Alioto's trying to destroy this entire document by constantly referring to prices. My question has not gone to prices. It has gone to the market share. And I have qualified Dr. Anderson, with his opinion that an 85 per cent

sample is an almost perfect one, and that he as an expert can make some observations with regard to competition from the statistics of the total number of frozen pies sold by the three defendants and by the plaintiff in this action. He has at no time in answer to the questions referred to price.

Mr. Alioto: Certainly, he can ask about what documents may show, what certain specific documents may show; but to ask the witness whether or not his study of invoices, which don't even show the real prices, whether or not the study of invoices shows competition, competition in the market place, when the witness doesn't have the background in the market place other than the study of invoices, and Mr. Schafer's telegram—these are his sources—

Mr. Lamb: Let me try one more question.

Mr. Alioto: The telegram is 125 for identification. This is the source of his information on Morton.

The Court: Let me see. Let me read this.

Mr. Schafer: Not all of his information.

The Court: Well, now, let's not get into any argument about this. Now, all I want to do is read this telegram.

(The Court examines.)

[fol. 1004] The Court: All right.

Mr. Lamb: If your Honor please, first may I state to the Court that the questions which I am directing toward this witness have nothing to do with prices. The questions that I am limiting myself to, in view of this problem, are the question of market share.

The Court: Well, now, the thing that's troubling me—and maybe you can direct your questions to this—the thing that's troubling me is that Dr. Anderson's qualifications—the only qualification he has to speak about this matter is derived from the material that you lawyers supplied him. Right?

Mr. Lamb: Oh, no, your Honor. These data that I speak of now are data which were collected by Dr. Anderson and Dr. Lambourne.

The Court: All right. All right. Dr. Anderson and his staff went around to AG and to the other people here in town, and he got some information from them, and he got some invoices from you folks, and maybe some other information; but he didn't get all of it, he didn't get all of it. Now, secondly, Dr. Anderson doesn't have any personal knowledge whatsoever about what went on in the market place during the time in question in this lawsuit. He had no idea about that.

Now, to ask him to give a professional opinion this afternoon on what forces were working in the market place, and how—and that's what you're getting at—what forces were working in the market place and how, in the period in question, in this lawsuit, when he doesn't have all of the data on it, is, it seems to be an improper hypothetical question.

Mr. Lamb: If your Honor please, may I speak first to the adequacy of the study itself? The witness testified that 85 percent is a near perfect sample—or, near perfect universe. Normally, economists and statisticians will develop a mathematical formula for a random sample by which they will select ever so many invoices and reduce it down to a relatively small number, which, in the language of an economist, becomes a universe. They know precisely how many they have to sample in order to reach the best conclusion. We didn't use that sort of a sample here. We went out and received information from all of the major buyers in this market and got 85 per cent of the total; and the reason we know we got 85 per cent of the total is the fact that—and I'm speaking now of the number of pies sold—

[fol. 1005] The Court: Have you seen that telegram?

Mr. Lamb: No.

Mr. Alioto: The only basis on which—

Mr. Lamb: I'm not talking about prices now.

The Court: You ought to take a look at it.

Mr. Alioto: I'm talking about share. I'm talking about market share. Instead of getting the market share of Morton from the invoices which he asked for, he gets them in a telegram from Mr. Schafer addressed to your associate, Mr. Thatcher. I don't know how you didn't see that. It's addressed to your people.

The Court: Well, now, let's not have any argument about this. Let's not have any argument about it. I don't want to cut anybody off, particularly you, Mr. Lamb, because I'm thinking about ruling against you, and I want you to have every opportunity to say anything you want. You go right ahead.

Mr. Lamb: Your Honor, I asked Dr. Anderson—and I will ask him again, if necessary—whether or not the market share data that he had—and I'm not speaking about prices, I'm speaking about the number of dozens and thousands of dozens of frozen fruit pies sold in this market—I asked him whether or not an 85 per cent universe was an almost perfect one, and he said yes. That was his answer. Now, I qualified him as a professor, doctor of philosophy from Utah State University, who is competent to testify with regard to what is a proper universe for the determination of an answer to these questions.

Now, instead of using a formula sample, he went out and surveyed the whole market; and he got 85 per cent of it, and he was able to check the accuracy of that 85 per cent as against an IBM run which we furnished to him. And I say, your Honor, that in respect to the market shares as reflected by Defendant Pet's Exhibit A-36, on which there are no prices at all, that Dr. Anderson in his expert capacity as an economist can testify as to whether or not there was competition in this market in view of these changes that took place in the market from 1958 through 1961. And the question on the Robinson-Patman side of the subject, your Honor, is to determine whether or not—

[fol. 1006] The Court: I know. You don't need to spell it out to the jury.

Mr. Lamb: Therefore the element of competition in the market place, as reflected by these data, is relevant, it is material, and it is competent, for an expert to answer whether or not that picture reflects competition.

Mr. Alioto: If your Honor please, first of all this perfect universe is 85 per cent predicated upon a telegram sent by Mr. Schafer—predicated in part upon a telegram sent by Mr. Schafer. I think the record will show at this point that the telegram handed to the court was marked Plaintiff's Exhibit 125 for identification, the telegram which the court read. I would like to direct a very short voir dire question to Dr. Anderson about this telegram, if your Honor please.

The Court: Go ahead.

Mr. Alioto: I don't think the record shows it.

Voir dire examination.

By Mr. Alioto:

Q. Dr. Anderson, there came a point where you discovered that the Morton, or the Continental, invoices were not present at the Wholesale Grocers in Salt Lake City when you examined their files; that is correct, is it not?

A. That's right.

Q. And as a result of that you made a request of Continental to produce their invoices to you, is that correct?

A. A request was made by Mr. Thatcher, who had engaged me to make the study. I did not make the request personally.

Q. Dr. Anderson, it is correct to say, is it not, that you have been engaged by Continental, by Carnation, and by Pet?

A. That's right.

Q. And that your compensation, whatever it is—and we do not ask for it—is coming from all three sources?

A. That's right.

Q. So that when you made the request of Mr. Thatcher to get the Continental invoices, you were making a request of your own client to give you his own invoices?

A. This is right.

Q. Now, is it a fact that you were told by Mr. Thatcher, who acted as your agent, presumably, in contacting Continental, that Continental refused to turn their invoices over to you? Didn't he tell you that?

Mr. Schafer: Isn't this cross-examination?

[fol. 1007] Mr. Alioto: No. This is voir dire.

The Court: No, I think we ought to pursue it.

By Mr. Alioto:

Q. That he refused to turn the invoices over to you, that is correct, is it not?

A. He didn't tell me he had refused them. I don't remember him saying this. He did say—or he sent this telegram in lieu of it.

Q. So that the basis for the study and the charts that are in evidence, so far as the market share of Continental is concerned, is this telegram which is marked 125 for identification?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes.

Mr. Alioto: We will offer this telegram, if your Honor please, in connection with this voir dire and as a further ground for our objection.

The Court: Received in evidence.

(The document marked Plaintiff's Exhibit No. 125 for identification was received in evidence.)

Mr. Schafer: I certainly want the jury to see that telegram.

Mr. Alioto: I will read the telegram.

The Court: These interruptions and arguments do not advance the cause at all. There is no sense in them. We try to maintain a little serenity in the courtroom here, a little quiet, a little dignity; and maybe, as a result, there will be a little light shed on some of these things, instead of so much heat.

Now, what do you want?

Mr. Schafer: Your Honor, I would like to ask the witness one or two questions right now if I may to clear up this latest imputation on my calendar.

The Court: The court isn't interested in that at this point.

Mr. Schafer: It goes, your Honor, to the accuracy of the witness' study.

[fol. 1008] The Court: I am not interested a bit in imputations around here. Nobody is concerned with imputations. We are just trying to find out what are the facts, so we can proceed with the lawsuit.

Mr. Schafer: May I ask then—

The Court: If you are talking about clearing up an imputation, I am not interested in hearing about it. If you are talking about voir dire, why, you may proceed.

Mr. Schafer: Just about two questions on the last subject matter raised, your Honor.

The Court: You ask the question, and we will see where we go from there.

Voir dire examination.

By Mr. Schafer:

Q. First, Mr. Witness, isn't it a fact that not only Morton's invoices were missing from a couple of these buyer organizations, but that the invoices of Pet and Carnation were also missing? Isn't that true?

The Court: Well, that isn't helping the cause.

Mr. Schafer: That's what he testified to earlier.

By Mr. Schafer:

Q. Isn't that a fact, that the reason you had to get Associated Grocers' data from the defendants was that Associated's invoices had been lost? Isn't that correct?

A. That is correct.

Q. Isn't it also a fact, Mr. Witness, that when your study was finally done, that it was checked for accuracy against every single Morton invoice, checked by Mr. Thatcher, isn't that a fact?

Mr. Alioto: How does he know?

The Court: Mr. Thatcher is shaking his head over there. Maybe you folks ought to get together. I think it is about time we let these men go to the hotel and talk to each other.

Mr. Lamb: If your Honor please—

The Court: In the first place, I am going to clear up the [fol.1009] record at this juncture, and I am going to sustain Mr. Alioto's objection to your question up to date.

Now, after thinking it over overnight, if you want to come back here and ask questions of your witness, why of course, nobody is going to stop you. But at this juncture I am sustaining the objection to the questions asked here just now.

* * * * * * * *

[fol. 1011] Roice H. Anderson resumed the stand and testified further as follows:

Direct examination.

By Mr. Lamb (continued):

Q. Dr. Anderson, we should like to explore further your training and experience in the field of economics and marketing, both generally and also as they relate to the preparation and use of studies such as the one you have made in this case.

A. As I indicated, and perhaps needn't repeat in detail, I have been trained in the field of economics, marketing, and statistics, and have had experience in this area for the last twenty years. 1943 was the time that I received my Ph.D. degree. I had two years out in this time in the Service, as I indicated.

My training consisted of taking courses in these three areas of statistics, economics, that is, economic principles and theory, and marketing principles and theory.

My experience has been along these same lines, in doing research work. At least two-thirds of my working time has been spent in research activities where I have dealt with many commodities, agricultural commodities in particular, some of these raw materials, some of them have been ready for the consumer, that is, processed agricultural commodities. And my experience here has taken me into the areas of collecting factual information, collecting data, analyzing these data, to show trends, to show relationships between prices and quantities and such things, and then, in addition to this, interpreting the data and writing reports which have been published as Experiment Station bulletins at Utah State University.

I could indicate titles of such publications, which indicates the nature of the work and the products I have worked with. I could just mention these briefly. I have worked primarily with poultry products, chickens, eggs, turkeys, also worked on a project of wool marketing, one of alfalfa hay marketing. And these studies have permitted me to collect the facts, to interpret the data, to analyze the data, and to form opinions regarding the relationships, and so on, involved.

Q. What is the nature of the conclusions you can draw as such an expert from such a study, without at this time stating any conclusions you may have drawn?

A. Well, getting information on any commodity, dealing with production or consumption or sales and prices, it is possible to take these kind of data, to correlate them, to

[fol. 1012] relate price changes with quantity changes, to plot and measure trends in production and trends in prices and draw conclusions with respect to causal relationships between these kinds of statistical measurements.

Q. Have your studies and experience included study and experience as to the nature and characteristics of a free enterprise market economy as it applies to commodities in trade generally and pies in particular?

A. Yes. On any study an expert in this field must start with some kind of criteria, some model, if you will—we call it a model—from which we hypothesize the problem to be analyzed.

We start, of course, in our economy with the competitive model. This is the kind of economy in which we operate, so we begin with the economic model as a firm in competition, and then, as we collect data about the market of any particular commodity, we can fit it into the model and draw conclusions as to whether the market for the particular commodity is competitive, whether it's—there are elements of what we call imperfect competition which, leading to the extreme, would be elements of monopoly involved.

This is as it applies, it seems to me, to any commodity and it particularly could apply to frozen pie in the Intermountain market.

Q. Dr. Anderson, since you left the court yesterday have you had an opportunity to inspect the invoices of the Morton Company?

A. Yes, I have. Last night I went over all of the invoices that they submitted on their sales in this market.

Q. Did you have an opportunity to check all of the prices as against the data which you collected?

A. Yes. I saw the prices on these invoices. I didn't have time to incorporate the additional invoices on prices into the price data that were submitted yesterday. The only addition involved here would be some additional months when data were available.

As you recall, some of the months on the Morton Pie Company did not have price data until we saw these in-

voices last night. We, with additional time, could pinpoint some additional months, but the same general trends of prices should prevail.

Q. Now, I show you Pet's Exhibit A-35 for identification which is in evidence and turn to Page 15 and ask you whether or not you would like to have changed that document; I ask you if you have changed it as a result of the inspection of the invoices last night.

[fol. 1013] A. Yes. The one price that was of concern yesterday was this price of July, 1961 where he had an average or a range in prices from $1.28 per case to $2.61 per case. We had two observations only. Our method of getting this general level of prices that I described yesterday was to take the number of observations that we had and to statistically get at some measure of central tendency here to indicate the level of price. Now, when it was called to our attention that this price of $2.61 was unreasonable, we did take a look at the invoice. We got the particular invoice that this was concerned with and found that an error had been made. In any kind of statistical study you're always looking for any possible errors and willing to change errors, but not to change procedures and method. But we found that this was a price quotation for a per dozen pies rather than per case of six. Morton's pies come in lots of a dozen. Some others come in sixes, and this was an error on our part. So we would change that price down to instead of $2.61 it would be $1.31 or $1.30½ for per case of six.

Q. Well, then, what does the range show now?

A. The range now shows $1.28 to $1.31 with a median as we used in our procedures of $1.29. And this represents then the invoice price, and we have changed my chart to reflect the price of $1.29.

Mr. Lamb: If your Honor please, we would like to have permission to correct Pet's Exhibit A-35 in evidence to conform with the testimony of Dr. Anderson.

Mr. Alioto: No objection.

The Court: All right.

By Mr. Lamb:

Q. Dr. Anderson, I now show you Pet's Exhibit A-38 for identification and ask you whether or not you have made corrections in this chart to reflect the error you have discovered?

A. Yes, I have.

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[fol. 1014] Voir dire examination.

By Mr. Alioto:

Q. With respect to this exhibit which is A-38 for identification, Dr. Anderson—never mind your turning it around, Mr. Lamb—so far as the Pet-Ritz and the Simple Simon and the Bel Air prices are concerned and even the Swiss Miss prices, so far as they are concerned, Dr. Anderson, it is a fact, is it not, that those do not represent actually what these wholesalers paid, actually paid minus any advertising allowances they may have been given at the time; that's right, isn't it?

A. No. They do include the advertising allowances as shown on the invoices in addition to—in addition to this the wholesalers file with their invoices any credit memos which indicate advertising allowances, and these are usually—it's their practice to clip these right on the invoice. And when we took these data from the invoices the prices were corrected for all of the advertising and other off-invoice allowances that were present in the file. We admit that in some cases the advertising—or the credit memo was not yet applied for or was not in there on some invoices and this accounts for some of the variation that we found in our average prices. But again, when we used the method that we did to determine these average prices we were eliminating these extremes both high and low, and we are representing these prices as not the—necessarily these highest or lowest prices in any period because we have an

average for a month. This is what we have submitted here and represented these to be and not showing daily changes.

Q. In other words, it's perfectly clear, is it not, Dr. Anderson, that any advertising allowances which were, in fact, given but not clipped to the invoices are not reflected on this chart at all?

A. They may not have been taken at all. They may not have been applied for so this would still represent what the wholesaler paid for the pie. He possibly did not advertise and, therefore, conform and get the allowance that he could have had had he applied for it. And in this case it wouldn't be in there and wouldn't suggest the—

Q. Well, on the assumption that he was the kind of a wholesaler who if he had a chance to get a rebate from advertising or for any reason, on the assumption that he was the kind of a wholesaler who would take the money that they were offering to him and he got that money, on that assumption it wouldn't be on the chart, would it; on the assumption that he was the kind who would take the money that was offered to him wouldn't it be on the chart?

A. It would be on the chart if he would take this money he paid then an amount less the allowance that was supplied him.

[fol. 1015] Q. Dr. Anderson, weren't you in court yesterday when Mr. Harsha testified on the advertising allowances?

A. I was.

Q. Do you remember his saying that it would be almost impossible to trace the advertising allowances given to specific invoices?

A. These wholesalers happen to keep these in their files along with, and attach them to, the very invoices to which they do apply. It may be more difficult for the—I'm not sure of it. It may be more difficult for the seller of pies, for the manufacturer, to trace back these in the way they keep their files. But the retailers attach this credit memo to the invoice which indicates the amount of allowance

and for the pies involved. And it's fairly easy to track this down, and we are able to do this in most—in the majority of cases.

Q. Well, to the extent that anybody—well, to the extent that any advertising allowances were not clipped to the invoices they are not reflected on your chart?

A. Some of them are not in there.

Q. Okay. Now, did you make any attempt to get from your own clients in this matter the advertising data that would have reflected the exact situation; did you make any attempt at all?

A. That was not part of my assignment.

Q. Excuse me, Mr. Anderson, listen to my question. Did you make any attempt at all to get from your very own clients the material in their files which would have reflected the situation exactly?

A. When—for these two firms for which the client had to supply the invoices in the case of AG and in the case of Albertson Food Company—

The Court: Well, now, you're not answering the question. After you answer the question you can say anything you want to.

The Witness: Yes. The answer is, yes.

By Mr. Alioto:

Q. You did make an attempt to get from your own client the exact information that would have made your chart exact?

A. Yes.

Q. And did you get it from them?

A. They supplied the invoices which also included along with those invoices these credit memos which they made available to the buyers for advertising allowances. In this case we would deduct this allowance as it related to specific times and specific flavors, and do it automatically regardless of whether the wholesaler actually in fact did take the allowance or not.

Q. Then you are telling me that this thing is exact in reflecting all of the advertising allowances that were given to these wholesalers by your client, is that what you're now saying?

[fol. 1016] A. I'm saying that to the extent that these advertising allowances were clipped to, in the case of the wholesalers, and that were supplied by the clients indicating advertising allowances made available to the buyers.

Q. Dr. Anderson, perhaps I'm not making myself very clear. First of all, let's start at this point again. I understood you to testify—now, maybe I'm mistaken—that this chart of yours does not reflect all of the advertising allowances that were in fact given by your client to these wholesalers, is that correct?

A. They are all in there to the extent that it's possible to get them in there.

Q. All right. Now, regardless of possibilities or anything else, can't you tell us whether you know that that chart in fact does not set out all of the advertising allowances given by your clients to these wholesalers; do you know that?

A. We took a count of every one that was given to us, therefore, I don't know of any that we did not account for. I don't know of any that were given that we didn't account for in the chart.

Q. Well, did you determine whether there were any that are not accounted for in the invoices?

A. Trying to get all of them, I'd say that I tried to get all of them if a—and if there were some that we didn't get, I didn't know about because I didn't see them. Otherwise I would have taken them into account.

Q. Just one last thing. This Swiss Miss price, is this some kind of an adjusted price, this Swiss Miss price?

A. The Swiss Miss price was calculated exactly the same as the others and does not represent, as I indicated, any day to day fluctuations, but represents an average of the wholesalers who bought Swiss Miss for any month.

Q. Did you see that study that was put in by Mr. Lamb yesterday indicating that Swiss Miss was consistently below the Utah—that is the Utah Pie label—did you see that study that was put in yesterday by Mr. Lamb?

A. I was not in the courtroom when that was presented.

Q. Well, then, you didn't see it?

A. No.

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[fol. 1017] Voir dire examination.

By Mr. Schafer:

Q. Dr. Anderson, am I correct in understanding that now this chart purports to report what the prices were for the various brands simply as reflected on the invoices that you studied?

A. That is correct.

Q. Am I correct in understanding, Dr. Anderson, that yesterday the chart that you offered—the purpose of that chart was to report what you understood to be the f.o.b. Salt Lake City pricing on these brands?

A. This was what I purported them to be. I long ago learned that you can't add peanuts to walnuts and come out with peanuts, so I tried to make it comparable in terms of point, and I was—had some information shown me which indicated that there were some differences in the point of pricing on the Morton pie, particularly—

Q. Doctor, I am just asking—

A. (Continuing) —the last few years, and so I did try to represent this as f.o.b. Salt Lake in all cases.

Q. And now the chart that is being reoffered today does not purport to take into account whether it is f.o.b. California or f.o.b. Salt Lake City, am I correct in that understanding?

A. That's right. It purports to show what the invoice prices were, the prices paid by wholesalers.

Direct examination.

By Mr. Lamb (Continued):

Q. Dr. Anderson, will you tell the Court and the jury what criteria do you use to determine whether or not there is competition in the market?

A. Well, as an economist, there are several measures which we consider in determining whether a market is competitive or not, whether it meets the conditions of what we call perfect competition, or whether there are elements of imperfect competition.

The first of these—I will just briefly list them and then try to develop them further—the first of these would be a criteria of the number of firms and brands of a product being sold in the market. This is an evidence of perfect competition if you have a large number of sellers.

Another criteria would be the relative importance of these sellers in terms of how they share the market, how [fol. 1018] large is one in comparison with another. This tends to give equal bargaining power. So the economist says that in a market where the sellers are relatively equal in their bargaining power, then we have the characteristic of a perfect competition. To the extent that there are some firms that are larger than others or some firms that are smaller, then we have some elements of imperfect competition.

A third factor of measuring the nature of competition in a market would be the ease of entry. A good deal has been said about this already, but if the product is of a nature that it's easy for firms to come in and manufacture this product, then this, in itself, implies a good deal of competition in the market, because, if one firm leaves, another can come in and pick up and produce the product.

A fourth factor in what I would call perfect competition, or a high degree of competition, would be a tendency toward uniform price. Now, this one, is kind of a double-edged factor, because a monopoly price is a single price,

but a price in perfect competition, which we have many products in agriculture, of raw materials, we only have one price here, and yet it is very competitive. So this one is a little bit of a problem unless you understand the nature of the particular product, but a tendency toward uniform price is another measure of competition.

And the fifth factor I would name would be the fact that in a competitive market absence of conspiracy, collusion, on the part of any of the buyers or of any of the sellers would be an indication of a high degree of competition.

I would say those five factors.

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[fol. 1019] (The document marked Defendant Pet's Exhibit A-38 for identification was received in evidence.)

Mr. Lamb: Thank you, your Honor.

By Mr. Lamb:

Q. Dr. Anderson, you are fully familiar with Pet's Exhibits A-36, A-37, and A-38. I would like to ask you this question: Do these data have significance respecting the activity of the frozen pie market in this area?

A. Yes. I think that they do.

Q. Can you then, as an expert, explain this significance, illustrating your testimony from the charts that are in evidence?

A. I would be happy to try to. I would like to see the—both of the charts, the volume charts and the—particularly the one on apple, because we do have just the apple prices. This should be noted, that these are prices only for apple pie.

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A. I think there is no question that there are some evidences here of changes in market shares that correlate very closely with the price changes year by year. Of course, many of these price changes take places in mid year, and so on, and we are representing only the shares,

or the sales for the whole period. This would make the correlation less than perfect, but I think we can see what has happened in the case of following through some of these individual price changes on this chart, compared with the volume changes on this exhibit.

We can take these brand by brand would be perhaps the way to do it. Let's start with the Pet-Ritz brand.

Pet-Ritz in the 1958 year was priced at about 2.50 per six-pie case. In that year Pet-Ritz enjoyed this blue, 3.3 thousands of dozens out of a market of 17.6.

[fol. 1020] The next year, or just in the latter months of that year, Pet-Ritz reduced its price to a little below 2.25, coming nearer to the other competitors in the market. And in 1959 they enjoyed 4.9 thousands of dozens out of 41,000.

Now, that was not an increase comparable with the market or the growth of apple pie in the market, as you can see. That was a very rapid total increase.

Another evidence of the—well, let's follow the Pet-Ritz right through, if you will. Coming over now to the year 1960, Pet reduced prices for a short period and then increased them toward the end of the year, and you will notice that Pet-Ritz went down from 4.9 to 3.1, reducing in actual dozens sold and, of course, in per cent of the market would have gone down very drastically.

And the same was true for 1961 when Pet again retained a high price of 2.25, and the volume of sales dropped clear to 1½. They were practically, let's say, priced out of the market.

Let's follow through Pet's contract with Bel Air, which came into existence, as you know, in 1959 and was priced just about equal with the Utah brand, beginning in that year. And you see what a share of the market they enjoyed that first year in the Bel Air brand manufactured by Pet. They got 9.7 thousand dozens out of 41. They retained this same competitive price situation throughout the period generally, but this was not to last consistently. It didn't grow with the market, even though they were competitive. They enjoyed some growth in 1960. They got up

to 14,000, and then went down to 8.7 thousand dozens, which percentagewise would give them a smaller share.

Now, we can take other individual brands. Let's take Simple Simon, for example. At the same time, or approximately the same time, that Pet-Ritz reduced its price, Simple Simon reduced about the same amount, down to 2.25, and they enjoyed an increase from this year to this year (indicating) 2.4 up to 3.2 thousands of dozens.

Then the following year they came down even further than Pet had to a point within approximately 5 cents per case, 5 to 6 cents, of the Utah brand, and this year their sales increased to 8½ thousand dozens out of 70,000. This was a more than proportionate increase. They enjoyed, if I recall, from about 8 per cent of the total market—now, on the apple I would have to check these figures, but on total market from 8 up to about 12 per cent of the total market.

[fol. 1021] Then from that period on Simple Simon again, the Carnation Company, maintained a relatively high price and enjoyed a smaller share of the market, 6.9 thousand dozens out of approximately 100,000 dozens.

Let's take the example of the Utah pie. Utah was priced here at something like 45 cents below these other two, and they enjoyed a big share of the market in 1958. They had 10.3 thousand dozens out of 17.6. On apple pie I don't know how this figures out. On total share of the market it was about two-thirds. The exact figure here could be calculated.

Then from then on they have—they decreased the price of this pie somewhat in 1959. They increased sales only slightly here, not nearly as much as the growth of the market.

And the next year, maintaining this same price level, they lost sales in spite of the rapid growth in the market.

They reduced prices again in 1961, and their share increased again in 1961. But some other factors have been involved here with the Utah Pie Company, because they introduced their Frost 'N' Flame brand in 1960. It was

priced down around $1.50 per six-pie case, and that year they enjoyed 15.1 thousand dozens, a very healthy portion of this market.

They continued this price and even reduced it some in 1961, and their sales went up to 25.9 thousand dozens out of 100,000, about one-fourth of the market.

I should mention Swiss Miss and their introduction by Pet in the summer of 1960. This, as you have already been told, is an economy pie, a 20-ounce pie, and this price represents the price of the 20-ounce pie. No adjustment has been made for the size of pie. We felt that consumers buy pie as pie, and not by the ounce. This is a very unique product perhaps in the fact that size is measured in both diameter and ounces per pie, and the consumer perhaps is not fully aware that when they buy an 8-inch pie they have the alternative of getting just a 20-ounce pie or a 24-ounce pie. But, in spite of that, Swiss Miss was priced here at a price about midway between Frost 'N' Flame and the Utah and Bel Air brand, and enjoyed a very substantial part of the market.

[fol. 1022] The Swiss Miss is the green, 6.4 per cent this year, even though they didn't start until the latter half of the year. They maintained this general price level for 1961 and enjoyed 16.3 thousand dozens out of 100,000 in 1961. A very substantial growth due to the fact that they were priced relatively low in the market.

The other example I would like to point to would be the Morton Pie Company, who, in the year 1958—bear in mind this is the company where we had limited number of observations to indicate a trend in price, but in 1958 they were the highest priced pie and, by the way, it was a 24-ounce pie at that time. They enjoyed a very small percentage of the market, .2. This would be .2 of a thousand dozens out of the 17.6.

They did reduce price somewhat in '59. They did increase their share somewhat, up to 1.9 thousand dozens. They practically—didn't have a large number of sales in 1960 and really don't have very good prices until the last

part of 1960 and in '61, and it was this period when they did reduce quite drastically the prices at which they sold their pie, and they did increase their sales of apple pie to 14.7.

Now, this is not—this is more spectacular really than their share of the total market, which comes to about 8 per cent, as I remember, of the market, and I have forgotten how many thousand dozens, but this is not per cent. This is 14,000 dozens out of 100,000 dozens.

So these illustrations, as I say, are closely correlated in time, and the market shares are highly correlated with the price changes that have taken place in the market as represented by the average wholesale prices.

Q. Dr. Anderson, based on your analysis, have you reached any conclusions with respect to whether or not there has been any lessening of competition in this market?

A. Yes. Based on these general principles, these economic measurements, by which competition might be measured or—I would say "measured," I have reached the conclusion that in general, taking the general first, that the pie market seems to be more competitive, have a higher degree of competition in the market, in the latter years, 1960-61, as compared with '58-'59.

To try to pinpoint this as to these particular factors, during the 1958 year there were seven manufacturers in [fol. 1023] the market. This includes these four we have on the chart plus some others that are included in "All Others." There were three additional firms. They had just seven brands. They had one brand each.

In 1959, as I recall, there were still seven firms, but one additional brand introduced, the Bel Air.

In 1960 the number of manufacturers had increased to nine, and the number of brands they were selling had increased to 12.

By 1961 the number of manufacturers actually declined to 8, and the number of brands increased to 13. So, based on this measure of number of brands competing in the market and number of firms competing in the market, we

would say that the degree of competition is greater by this measure in 1960 and 1961 than is true in 1958 and 1959.

Now, take the factor of relative importance of these firms and brands in the market. We have already been through this in some detail. You can see from the chart, from the exhibit, that these 13 brands, 12 or 13, in the years '60 and '61 do share the market relatively equally, although some of the other brands in there that we haven't—that we put in this "All Others" category, had very small volume of sales. But of the major brands involved, none had more than about—in the total market, I think it was about 22 per cent. No brand enjoyed more than this, and on a firm basis, no firm enjoyed more than 45 per cent.

I contend there is a good deal of competition between brands even of the same firm, because customers generally, consumers, are not aware of who makes the particular brands, who makes Swiss Miss. This is available to them, but they don't generally, I think, avail themselves of this, or are not concerned with this problem.

On the matter of ease of entry, much has been said about this, and I would like to indicate only one additional observation that was made in our collecting of these data, in trying to find who the buyer—or who the sellers were among these wholesalers, who sells pie in the market, we found these other firms, for instance—and I could name several of them—Libby's, Swanson's, Chet's, Johnston's. These will be familiar names to you.

In getting information about these firms and whether they did in fact sell pie to these wholesalers, we found that these firms are selling other products to these wholesalers. [fol. 1024] They are selling meat pies, they are selling all kinds of food products. They are in the market. It is not as though they are just not around. They are here and ready to sell. This illustrates ease of entry.

As soon as the price is right to the point where they can compete, they are here ready to sell frozen pie, because they are already here in the market with their organization, through their brokers, through their own representatives,

available and ready to sell this product if and when they can meet the competition. So I would say this kind of ease of entry illustrates a high degree of competition.

I wouldn't say that it was particularly greater in the latter years than it was in '58 and '59, but this is a fact about this product, the nature of its production, the fact that it is a product that can be manufactured without large investment of capital, without particularly skilled employees, and so on, and it is a rather easy one to get into.

But these other factors, tendency to uniform price, I can't say a great deal about this. I think the chart speaks some for itself. Perhaps you say the price variation is greater in the latter years, and I would say that is what the chart shows, except again remember that the Simple Simon and the Pet-Ritz represent now a very, or fairly, small percentage of this market, and so the bulk of sales do lie down in this general area of the—say, an average of Swiss Miss, from there up to Utah Pie, down to Morton's and Frost 'N' Flame. This is the bulk of sales taking place in a range there of possibly 15 or 20 cents per case.

Up here the spread in 1958 at least was as high as about 45 cents a case, so I think there has been, based on weight of numbers, some indication toward a uniform price, which indicates a higher degree of competition in the market.

Q. Dr. Anderson—

A. I have one other factor I would like to discuss if I may, in answer to the question, and that is with respect to collusion in the market or conspiracy on the part of several or two or more firms. As pointed out by the timing of these price changes and these increases and decreases in market shares, I think there are no evidence—there is no evidence from the data that would lead you to conclude collusion or conspiracy.

Mr. Alioto: If your Honor please, I make a motion to strike.

[fol. 1025] A. (Continuing) —on the part of—

Mr. Alioto: Excuse me.

The Court: The motion is granted.

Mr. Alioto: I make a motion to strike.

The Court: The jury is instructed to wholly disregard it.

Mr. Alioto: Goodness.

Mr. Lamb: This witness is an expert witness.

The Court: I know. The motion is granted. The jury is instructed wholly to disregard it.

By Mr. Lamb:

Q. Dr. Anderson, I have one more question I'd like to ask you. I show you Plaintiff's Exhibit 96 in evidence and ask you to take a look at that. Have you examined that tabulation?

A. Yes. I can't reproduce all the figures again.

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[fol. 1026] By Mr. Lamb:

Q. Now, according to this data taken from your study, the Utah Pie Company as indicated in the caption of everything except private labeled business sold 70 per cent of the frozen fruit pies in the Intermountain Area. The plaintiff bases its estimates of its losses upon the hypothesis that it should have retained its 70 per cent share of the market in the years 1959, 1960, and 1961. Now, Dr. Anderson, as an expert, will you answer this question: Is such a hypothesis consistent with the concept of competition?

A. For clarification, what is included in these private labels? Is this only—

Q. The private labels are not included.

A. Are not included. Is this the Bel Air only or does this include others that you call private labels?

Q. This study includes Carnation Company Simple Simon, Continental Baking Company Morton, Pet Milk Company's Pet-Ritz and Swiss Miss, and the Utah Pie Company private label Utah Pie.

A. That did not include Frost 'N' Flame?

Q. That does not include Frost 'N' Flame, does not include Swiss Miss, does not include Bel Air or either of the Utah brand or of the Pet brand.

A. I see no reason why a firm has entitlement to any particular percentage of a market that it happens to enjoy in any given year for any other period of time. The competitive system itself implies that firms producing the product are engaged in striving to please the consumers with their merchandise. And the fact that they enjoy a larger percent of the market in one year implies that they did please consumers, and that they did buy their product. But this does not give them any right to a particular percentage of this market at any other time.

Q. Now, Dr. Anderson, this record shows that frozen pies have been sold in this market in 1956, 1957, 1958, 1959, 1960, and 1961. The plaintiff has sought to select 1958 as a base year. Will you tell us as an expert statistician whether or not the selection of 1958 as a base year is a proper selection?

[fol 1027] A. Well, I would say that any time you select a base year you are assuming some normalcy, if you will. Ordinarily base periods selected for either price or production or consumption data would tend to include a longer period than any one year unless you had real justification that the years selected were normal in some respects.

Mr. Lamb: No further questions, your Honor.

Cross examination.

By Mr. Alioto:

Q. What year should he have selected?

A. You're asking me?

Q. Yes, of course, I'm asking you. You just said it was a mistake to select that year, didn't you? I'm asking you what year should he have selected?

A. I say, if you're trying to represent normalcy through

the selection of a base year, then you ought to look at all the years and determine whether an average of the group would be a better representation of normalcy or whether some other individual year is more representative of the year during which time that the product is being sold.

Q. What year should he have selected?

A. I would say on a period of this short of time, would be inclined to use an average of a group of years, not a single year, as a base.

Q. What year should he have averaged then?

A. You could average the whole period and say that this represents what they enjoyed for the whole period. Now, how do their year by year changes relate to the average for the whole period?

Q. Dr. Anderson, do you know anything at all about the proof of damages in antitrust cases?

A. I think I know something about them.

Q. Have you ever read on the subject matter.?

A. I have.

Q. What have you read?

A. I have read all the basic marketing texts put out by Phillips and Duncan, Converse and Hugey, and Maynard and Beckman, and these people who discuss the general principles of antitrust—

Q. Specifically with respect to proof of damages?

A. The Robinson-Patman amendment and this sort of thing, and I don't pose as an expert in this field. I haven't posed as an expert in the field of—

Q. In other words, you do not pose as an expert in the field on how damages are proved in trebled damage actions under the antitrust laws, is that correct?

[fol. 1028] A. I'd have to say this is correct.

Mr. Alioto: I make a motion to strike the testimony as it related to any damage exhibit in this case.

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[fol. 1030] Mr. Alioto: Now, it's perfectly clear that Mr. Lamb hasn't talked to the point. Again, nobody is contending that this measure of damages evinces some kind of a desire to build a Chinese wall around Salt Lake City. Nobody is contending that. Anybody was free at any time during this period of time to come into Salt Lake City, build a pie plant directly across the street from the Utah Pie Company and merchandise his pies on a unified price system without discrimination and on the basis of efficiency or anything else actually run the Utah Pie Company out of business. Anybody has always been free to do exactly that. Anybody has always been free throughout this period [fol. 1031] of time to reduce his price level uniformly throughout the United States if he wanted to enter a great big portion of the Utah Pie market. Anybody was absolutely free to do that at any time during this litigation.

What may not be done, of course, is to have a price discrimination brought about in part by cooperative activity directed toward the Utah Pie Company for the purpose of diminishing competition and, therefore, creating a monopoly. This, of course, may not be done.

Now, if saying that you can't do this kind of thing is building a Chinese wall around Salt Lake City, this is the way that the Congress of the United States based upon the experience of the Standard Oil litigation thought it ought to be done. And, of course, it's obvious that it should be done.

Now, this, first of all, is the first point apparently counsel has missed entirely. Proof of damages will only be determined by this jury after the jury has determined that there's been a violation; and until the jury determines there has been a violation, there won't be any proof of damages to be considered by the jury at all.

Therefore, at this juncture we have to assume that the jury has found that there was indeed a price discrimination or that there was indeed a conspiracy to run the plaintiff out of business or to injure the plaintiff or to impair his capital structure.

Now, if the jury has found that there was indeed this situation in 1958, beginning in 1958, then the question comes how much did the plaintiff lose. Now, here, nobody is talking about a $4.30 price alone. We have made a calculation based on a number of prices. That basic exhibit in evidence shows it. What the jury will then have to determine, and this is like ABC almost. I don't know why we have to keep repeating it here. What the jury will have to determine is what would have been the price in this market if these people hadn't violated the antitrust laws.

Now, apparently, this $4.30 price, I'm going to tell you right now what evidence I'm going to prove the $4.30 price. I'm going to use Dr. Anderson's study. He shows a price up here, the Utah Pie Company starting over 4.30, and he shows a Pet-Ritz and Simple Simon price of over 4.30, more than 4.30. This is the proof in damages I'm going to use on the 4.30 price. Presumably when they put it in they are vouching that that there is a reasonable price. [fol. 1032] So once again that jury finds that there has in fact been a violation, only then does the jury go to the question of what was a reasonable price, only then does it go to that question.

Now, then, I want to point out again that Mr. Lamb chose in this instance to direct his questions on Exhibit 96, to direct his questions specifically to the point as to whether or not this was a legitimate way to prove damages. And I tried to stop him, as your Honor recalls, but he went right ahead anyway. Then when we asked the witness whether he knew anything at all about the proof of damages, no, he said I don't know anything about it at all. I haven't read the literature on the proof of damages.

This is the only point I'm making. He is therefore not competent to testify on this matter. Now, the witness apparently didn't understand, and Mr. Lamb didn't make it clear to him, that the only time this comes into the picture is if the jury first has found they, in fact, violated the antitrust laws. And I submit that on the basis of the testimony the witness has given himself, that the jury

ought to be told to disregard any opinions he has given on Exhibit 96 as damage evidence.

Mr. Lamb: No further argument, your Honor.

The Court: Bring in the jury.

(Jury returns to the courtroom.)

The Court: Let me have that exhibit. Ladies and gentlemen of the jury, counsel have argued this matter to me. Mr. Alioto's motion to strike this witness's testimony based upon Plaintiff's Exhibit 96 is stricken from the records. You are instructed wholly to disregard it.

Cross-examination (Continued).

By Mr. Alioto:

Q. Now, Mr. Anderson, I'd like to direct my attention to your general dissertation on the matter of perfect or imperfect competition and whether or not a declining price in a declining percentage with respect to name brands as distinguished from private label evidenced a certain type of competition.

Do you recall that general testimony of yours? This is what I'm going to direct my attention to. Now, you understand it, I take it, from your readings in the antitrust laws what Section 2(a) of the Clayton Act is?

[fol. 1033] A. I'm not acquainted by section. You'd have to be more specific.

Q. Well, let me just say, I take it that you understand that prohibition in the antitrust laws on price discrimination so-called or differences in price where the effect is to lessen competition or tend to create a monopoly, you know about those provisions in the antitrust laws?

A. Yes.

Q. And I take it that you know that the very purpose of price discrimination—I take it you know the purpose for which that statute was enacted, the economic purpose for which that statute was enacted, is that correct?

A. That is correct.

Q. You know it derived, I take it, from the Standard Oil litigation during the administration of Theodore Roosevelt.

A. I am acquainted with those cases only by my reading, and I can't specifically pinpoint details about them.

Q. I take it you know that one of the charges in the Standard Oil case, as evidenced by the literature, not the cases—have you read Ida Tarbell's work, for example, on the nature of monopoly in the oil industry that resulted in the enactment of this section? Have you read that?

A. No.

Q. In any event, you have read the literature on this matter, some of the literature on this matter?

A. Some of the literature, in general principles area, rather than detailed, specific cases.

Q. You recall, I take it, that the specific purpose for enacting this section of the Clayton Act derived from the historical situation in the Standard Oil Company where interstate profits would be used for the purpose of dive bombing on prices, or selling—

Mr. Lamb: Your Honor, I object to this. This is a characterization. This is argument.

Mr. Alioto: This isn't argument at all. He permitted this witness to talk at great length as to what—

The Court: Objection overruled.

Mr. Lamb: There is no such word as "dive bomb"—

Mr. Alioto: I will change my word.

The Court: Objection overruled.

Mr. Lamb: (Continuing) —in the Robinson-Patman Act.

[fol. 1034] By Mr. Alioto:

Q. You know, do you not, that this matter of price discriminations where it affects a local seller, as against a national seller, derived from that Standard Oil situation where interstate profits were used to charge exceedingly low prices where the local competitor existed and keeping

prices high where he didn't have that competition of the local competitor, for the purpose of injuring the business of that local competitor. I take it you know that that was the background of this price discrimination section.

Mr. Lamb: If your Honor please, I object to the question.

Q. (Continuing) Is that correct?

Mr. Lamb: Because Mr. Alioto is testifying.

The Court: No, he isn't either.

A. This is correct.

The Court: He is asking a question. Objection overruled.

By Mr. Alioto:

Q. This section of the antitrust laws, as contrasted to, say, Section 1 or Section 2, which involves combinations or conspiracies in restraint of trade, this section of the antitrust laws objects on the ground that there is indeed competition in the market place, but unfair competition, isn't that what it is predicated upon?

A. This is right.

Q. So that if there is in this market, for example, an erosion of the price of the Utah Pie Company from a level of 4.30, we will say, down to a level of 1.75, if there is that kind of an erosion, it is not impossible, is it, that that erosion could have resulted from this Standard Oil type of competition?

A. I think this lower price is not necessarily an erosion of price. This is—if you had only one seller in this market, a monopolist, it would be to his advantage to reduce his price over this period of time in order to gain increased sales. You see the phenomenal increase in sales that have taken place in the market. This has been in large part due to the fact that the prices have generally been decreased

over the period of time, of all firms, and particularly the Utah Pie.

Q. Dr. Anderson, without your giving why these prices eroded, because that is ultimately the question for these ladies and gentlemen here, without your giving that, is it not possible that this price erosion could have occured because of the intense type of competition evidenced in the Standard Oil case about which I have talked to you? Isn't that one of the possibilities?

A. It is one of the possibilities.

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[fol. 1035] By Mr. Alioto:

Q. Now, then, I take it that throughout the period of time you were making your studies you were aware of the fact that the only pie manufacturer in the Intermountain area was located in Salt Lake City, that is, the Utah Pie Company.

A. This is correct.

Q. I take it it would be quite natural that the Utah Pie Company would have most of its business in the immediate area of its plant.

A. I would expect it to.

Q. And that is predicated upon the fact that it is the cheapest and most efficient producer in that area?

A. I would say the cheapest, maybe not the most efficient.

Q. Well, they are efficient in the sense that it is located, its plant is located, in the marketing area.

A. This depends on its location of raw materials, where they come from, the relative prices or cost of transporting raw materials for pie, relative to finished product, these sort of problems, so I say it is likely they are the cheapest because of these things, but not necessarily saying that it is the most efficient.

Q. In the light of the fact that it is the only plant located in the Intermountain area, it is apparent, is it not, Dr. Anderson, that its marketing area not only includes

the area around Salt Lake City, the customers around Salt Lake City, but that marketing area, for example, includes Denver, Colorado in a competitive situation with plants that are located in California? That is quite clear, isn't it?

A. I would think if they are interested in expanding their sales, they would push out in this manner.

Q. You would agree with me, would you not, that the relevant competitive market between a plant located in Salt Lake City and three plants located out in California, that that relative competitive market would obviously include the Denver, Colorado area? You would agree with that, wouldn't you?

A. Very likely would.

[fol. 1036] Q. You would also agree, would you not, Doctor, that a plant located in Salt Lake City, as against three plants located below San Francisco, or in Southern California, that the Washington market and the Oregon market and the Montana and the Wyoming markets would also be relevant competitive area?

A. Absolutely.

Q. Now, it is a fact, is it not, that your entire study on market share, your entire study on market share, is centered around Salt Lake City and southern Idaho only? That is right, isn't it?

A. This is right. We identify our market as what we call the Intermountain market, or the area within which wholesalers distribute product primarily from Boise, Idaho and Salt Lake City. This would be the definition of our market.

Q. And you made not attempt to make any study of the market as it would involve those relevant competitive areas, or what you have agreed with me would be relevant competitive areas, Colorado, Wyoming, nothern Idaho, Montana, Washington, Oregon, and Nevada?

A. This is correct. I was asked to make a study of the market shares in the Intermountain market and not to include these others. I could have done so had this been part of my assignment.

Q. It would have been very easy to have done it had it been part of your assignment?

A. Just as easy as it was to get the data for the other study.

Q. Of course it was. But you were told not to do it?

A. No, I was just told to do this, and I didn't—

Q. How did you actually do it? You took the invoices of the wholesalers located in Salt Lake City?

A. And Boise, in this Intermountain area.

Q. Name for us for the record—I didn't think it is here—all of the wholesalers whose invoices you studied?

A. AG, Safeway, AG Pocatello, The Associated Foods Twin Falls, Associated Foods Boise, Idaho Creameries Boise, Albertson's Food Company Boise. In the Salt Lake market others were A & P Fisheries, Booth Fisheries, others that we tried to contact were Lockhead Fisheries—this one had gone out of business. Sun Freeze Arden Ice Cream, Chase Ice Cream in Provo. These are all I can recall, but this is a large percentage of them.

Q. And basically your work was concentrated right here in Salt Lake City in the offices of these various companies?

A. These and in Boise, yes.

Q. Yes. Now it wouldn't be unusual in a competitive situation, or in a competitive picture, would it be, Dr. Anderson, if it developed that the Utah Pie Company's share of the immediate market around Fresno, California, where the Pet-Ritz plant is located, if it developed that the Utah Pie Company's share of that immediate market was zero, this wouldn't be unusual, would it?

A. No, I don't think it would.

[fol. 1037] Q. And if it developed that the share of the Utah Pie Company out here in Frankfort, Michigan, where the Pet Company is located, the share of the Utah Pie Company of that market was zero, that wouldn't be unusual, either, would it?

A. No.

Q. You would naturally expect that the location of the plant has a great deal to do with competitive factors?

A. Yes.

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By Mr. Alioto:

Q. I take it, in connection with the competitive factors, Dr. Anderson, that there is a distinction, in terms of the good of an independent firm, there is a distinction between it enjoying a brand business as against a private brand business?

A. Yes, I am certain of this.

Q. And to the extent that there is a loss in market share in its brand business, to the extent that that can be demonstrated, that is definitely a competitive injury to that business, isn't it?

A. I don't think this necessarily follows.

Q. In other words, you don't think that an injury to the brand business of an independent doesn't necessarily follow that that is an injury that injures, that damages, that business competitively?

A. As I pointed out in my data here, and I will take the Swiss Miss as an example, I would say that the introduction of Swiss Miss by Pet Ice Cream Company, or Pet Milk Company had more damage on their—well, cut into their market for Pet-Ritz more than perhaps any other product on the market. At least they lost this and gained the Swiss Miss. But, by the same token, any private label might introduce their own private brand, their own house brand. A company might introduce additional brands either under contract or any other arrangements which might actually take sales from their own house brands.

Q. Perhaps I didn't make my question very clear then. I am talking about the Utah Pie Company.

A. You are talking about Utah brand of Utah Pie Company?

Q. I am talking about the Utah brand of the Utah Pie Company.

A. Okay.

Q. And I am talking about that Utah brand in contradistinction to a private label brand. You would agree with me, would you not, Doctor, that if there is any substantial loss of market share by an independent of its brand product, that that could be an injury, a competitive injury, to that business?

A. Could be.

Q. You would agree with that?

A. But not necessarily.

[fol. 1038] Q. All right, but it could be.

A. Could be.

Q. It is a fact, is it not, Dr. Anderson, that your own market share study discloses that in the beginning of this period, in the beginning of this period, the Pet-Ritz Company private label business, the Pet-Ritz Company private label business, was approximately one-quarter of the Utah Pie Company's private label Utah Pie business? That is correct, isn't it? In other words, it looks like about 9300 cases for Pet-Ritz as against—9,300 as against 37,000 for the Utah Pie Company. However, when we come to the end of the period, your own study shows, does it not, that the Pet-Ritz private labels, that is, Swiss Miss and Pet-Ritz—

A. Yes.

Q. (Continuing)—at the end of the period—that Swiss Miss and Pet-Ritz combined exceeded the number of cases that the Utah Pie Company sold under its Utah Pie label; that is correct, isn't it?

A. To be accurate here, I content you should still stay with the Pet-Ritz brand and its relationship to the Utah Pie, if you want to make this kind of a comparison.

Q. Was Swiss Miss a private label belonging to some buyer who could take it away momentarily or at the whim of the private buyer, could take it away from the Pet Milk Company?

A. No.

Q. It was a label owned by the Pet Milk Company, that is correct, isn't it?

A. That is right.

Q. And Pet-Ritz, of course, was another label owned by the Pet Milk Company?

A. Right.

Q. And I think you would agree with me that there is economic value in owning your own labels as against having a private label that might be filled by any manufacturer in the company.

A. I think—

Q. There is some economic value, isn't there?

A. Absolutely.

Q. So that if you took the combined volume of all of the private label—not private label, but the brand label owned by the Pet Milk Company, it came from a 4-to-1 deficit position in 1958 to the leading company in the brand business in this area in 1961, didn't it? Is that fact correct, first of all?

A. That fact is correct, but—

Q. Now, do you say that—

A. But—

Mr. Lamb: Let the witness answer, if your Honor please.

By Mr. Alioto:

Q. Go ahead sir.

A. I have already pointed out, sir, that this Swiss Miss pie is an economy pie. It is priced lower to meet the demands or desires of consumers for an economy pie, and its sales that it enjoys, and the share of the market that it enjoys, is due to, primarily, this fact, that it is a low-priced pie and competes in this area and has increased its sales tremendously, probably at the expense of, or at least partially at the expense of, the Pet-Ritz.

[fol. 1039] Q. I take it, Doctor, that in your readings of

the antitrust literature, as you have described it in your examination with Mr. Lamb, that you came across the phrase "fighting ship" or "fighting brand."

A. Yes, I am acquainted with this general term.

Q. And I take it you know what a "fighting ship" or a "fighting brand" is in the literature of the antitrust or the monopoly laws? You do?

A. Yes.

Q. Will you explain to the Court and jury what that expression means in the literature of the monopoly laws?

A. It is my understanding that this could be a brand that is used to compete in the market.

Q. Well, doesn't it mean something more than that in the antitrust literature, Doctor?

A. It could be one that is designed—you are trying to get me to say it is designed—

Q. I am not trying to get you to say anything. You said you know about this literature, and I am simply asking you what the fact is as to what that expression means in the literature of our monopoly legislation.

A. The name itself indicates what it means when you say it is a "fighting brand."

Q. What does it mean?

A. It means it fights the competition, it meets the competition in the market.

Q. Isn't this what it means, Doctor, in our literature of the antitrust laws, or monopoly laws—doesn't it mean that where for other reasons you don't want to reduce the price of a certain named brand, you then introduce what in effect is a competitive product and use it as a fighting ship against competition, particularly independent competition, isn't that what it means in the literature?

Mr. Lamb: Your Honor, I object to these conclusions and the testimony of Mr. Alioto.

Mr. Alioto: They are not conclusions.

The Court: The objection is overruled.

A. There is no indication—

The Court: This is cross-examination.

A. (Continuing)—as I can see—excuse me, your Honor.

The Court: He said he knew about that.

[fol. 1040] By Mr. Alioto:

Q. My first question is: Isn't the way I have defined "fighting ship" or "fighting brand," isn't that what the expression means in the literature of the antitrust or the monopoly laws? I am not talking about this situation. I will come to that in a moment. Isn't that what it means?

A. I think I said that.

Q. All right. And isn't Swiss Miss, from your study of the market and the manner in which it was operated, from your external study of the market, as distinguished from what may have been in the minds of these people—isn't Swiss Miss—doesn't Swiss Miss fall within the category of "fighting ship," as that expression has been used in the antitrust laws?

A. I don't think you can prove this from the data that have been collected.

Q. It doesn't prove it one way or the other, is that correct?

A. This is right.

Q. Okay. Now, on the business of perfect or imperfect competition about which you spoke a good deal, and at some length, I take it you would agree with me that a national company, that national companies, national companies which in the years 1958 to 1961 make, respectively, on all of their other business, say, 85 million dollars before taxes, 23 million dollars before taxes, and 74 million dollars before taxes, that companies with those kind of profits who sell in local markets at a loss, and plan those losses in advance, that that would be evidence of some ulterior motive under the antitrust laws?

Mr. Lamb: I object to that, your Honor.

By Mr. Alioto:

Q. Would you agree with that?

Mr. Lamb: I object. It calls for a conclusion of the witness.

Mr. Alioto: He's always been giving his conclusions, all morning.

The Court: He is your expert. This is cross-examination.

Mr. Lamb: An expert on economics and statistics.

Mr. Alioto: On fair competition and competition. You even asked him whether or not the evidence of this market place discloses a competitive situation, and I am cross-examining on those questions.

Mr. Lamb: He is asking for a legal conclusion, your Honor.

[fol. 1041] Mr. Alioto: This is a factual conclusion, I am asking for, whether it gives the inference of a fact, people that do things like that.

Mr. Lamb: May I have the question read again, please, your Honor.

(Question read.)

Mr. Lamb: I object to it on the grounds that it calls for a legal conclusion.

The Court: The objection is overruled. It seems to me it is asking for a fact.

Mr. Schafer: Your Honor, if the question assumes that Morton sold at a loss and projected sales at a loss, I object, because there is nothing in the record to support that.

The Court: The objection is overruled. You may answer the question.

The Witness: Would you repeat the question again, please? I have it generally in mind, but I am not sure now whether you want me to say—

The Court: He doesn't want you to say anything.

A. (Continuing) Yes or no. You try to put these questions in terms of a yes-or-no answer, when they can't be answered this simply.

By Mr. Alioto:

Q. That is not so. I am not asking you to say yes or no, period. You can say yes or no and then you can say anything you want and speak as long as you want, Doctor. I have no objection to that, sir.

A. I need the question re-read.

(Question read.)

A. The answer would be yes, if you could prove all the allegations that you have made about these companies.

Q. Thank you. Now, then, on this matter of competition in this market place, as you have discussed it, Dr. Anderson, I take it that from your reading of the antitrust laws and the antitrust literature, and from the standpoint of the economics of it, now, not the law of it, but the economics of it, that you are acquainted with the expression "exclusive dealing contracts" or "franchises"?

A. Yes, sir.

[fol. 1042] Q. And you understand—and are you acquainted with the expression "requirements contracts"?

A. I can't say that I know specifically what this detail means.

Q. Total requirements contracts?

A. I would say that it would be one firm supplying the total requirements for a particular market.

Q. Yes.

A. Particular seller.

Q. On an exclusive dealing basis.

A. Okay.

Q. Now, I take it that if it were the fact that we had such a contract in this case in relation, say, to the very important Bel Air business, if that turns out to be the fact, and on the assumption that that is the fact—this, of course,

is a highly anticompetitive economic fact, isn't it? It would be, wouldn't it?

A. Yes. Again assuming that you could prove this allegation.

Q. Yes, all right. And assuming we can prove—I mean, assuming the fact is—the proof is a matter for this jury to determine—assuming the fact is that such a contract is in existence between, we will say, the Pet Milk Company and Safeway for all of the Bel Air business under private label fruit flavors—assuming that fact to be so, would you agree with me that the economic vice of that under the antitrust laws is a fact that the independent is not permitted to deal just for his area alone?

Mr. Lamb: I object. It calls for a legal conclusion. The contract between the Pet Milk Company and the Safeway Company is in evidence, and it speaks for itself. Counsel can argue—

Mr. Alioto: I am not characterizing:

Mr. Lamb: (Continuing)—about what it is as a matter of law at an appropriate time. I therefore object to the question, because it calls for a legal conclusion by this witness.

The Court: Overruled.

The Witness: I would like the question re-read again. The way it was stated in the last—

By Mr. Alioto:

Q. Let me rephrase it so there will be no question. On the assumption that it is a fact, not saying that it is now, because the jury will determine it—on the assumption that it is a fact that there was an exclusive dealing arrangement on a national basis between the Pet Milk Company and the Safeway Stores for the Bel Air business in all of the Safeway Stores in the United States on fruit flavors, [fol. 1043] excluding pumpkin and mince, on the assumption that that fact exists, its anti-competitive vice would be, would it not, Doctor, that it precludes the independent

from dealing with Safeway on an area basis where the independent has a freight advantage and an efficiency advantage? Isn't that the anti-competitive vice of it?

A. In this case it seems to me that it would depend on whether or not the private label here is—it depends on how it is marketed in this regional market and the pricing policy that it uses. Now, if it is—if this private label is used to be a price leader and to eliminate competition, then I think your allegation would be so. But in my study of this market, and based on the facts, the Bel Air brand has been priced competitive with Utah Pie, but above others in the market. And as I saw it in operation, Safeway did, in fact, buy pie from other companies and did, in fact, sell it in their stores and did, in fact, lose share of the market over the period of time.

So I think it depends entirely on the action of the private label in terms of whether they enforce—or require their stores to sell the private label as against letting their regional managers buy competitively in the market.

Q. What other companies did Safeway buy Bel Air fruit pies from?

A. They didn't buy Bel Air but they bought other brands in competition with their own.

Q. I didn't make my questions clear then. I'm talking about Bel Air pies and I am talking about the business that a pie manufacturer would receive by manufacturing Bel Air pies for Safeway. That's what I'm talking about.

A. I see.

Q. Now, I would be correct, would I not, Doctor, and you would agree with me in the light of your study of the antitrust literature, that the anti-competitive device of an exclusive dealing contract between Safeway and Pet-Ritz covering all of the Safeway Stores in the United States on the Bel Air label for fruit pies, that the anti-competitive device would be that it would preclude the independent from negotiating with Safeway covering just the pies, the Bel Air pies, in the marketing area of the independent pie manufacturer.

Mr. Lamb: If your Honor please, I object to this question. Mr. Alioto is characterizing the contract between the Pet Milk Company and the Safeway Company as an exclusive dealing arrangement when there is no such provision in the contract and he knows it's not an exclusive dealing contract.

Mr. Alioto: I know just the opposite.

The Court: The objection is overruled. I heard that evidence.

[fol. 1044] The Witness: It should be pointed out and the chart show it—

By Mr. Alioto:

Q. Would you mind answering my question first, Doctor, and then point out anything you want, Doctor, anything you want, but answer my question first. Is that not the anti-competitive device that a circuit deal or an exclusive dealing arrangement, assuming that to be the fact, and assuming this jury finds it to be the fact, is it—

Mr. Lamb: Your Honor, I object to the characterization of a circuit deal. There is no such language—

The Court: I think it pretty bad courtroom practice to interrupt in the middle of a question before it's finished because we don't know what the question is yet. Now, go ahead, Mr. Alioto, and ask your question and when it's completed, Mr. Witness, you withhold your answer to give counsel an opportunity to make his objection.

Mr. Lamb: Thank you, your Honor.

By Mr. Alioto:

Q. In the light of your testimony, your direct testimony, and the light of your study of the competitive features in this market and in the light of all of the things you have said on your direct examination, you would agree with me, would you not, taking the assumption that there is an exclusive dealing contract and that the jury finds there to

be an exclusive dealing contract between the Safeway Company and the Pet Milk Company on the Bel Air label for all of the Safeway Stores in the United States, you would agree with me, would you not, that the anti-competitive device in the sense of our monopoly statutes, the anti-competitive device is that the independent manufacturer in a particular region is thereby precluded from negotiating and securing the right to manufacture the Bel Air label in a regional area. Isn't that the anti-competitive device that the antitrust literature condemns in so-called exclusive dealing contracts?

Mr. Lamb: Your Honor, I object on the ground that it calls for a legal conclusion.

The Court: No, I don't think so. Objection overruled.

The Witness: Yes, but it is not a fact that the Utah Pie Company did not manufacture some Bel Air pies. The chart shows that they had the contract to produce mince and pumpkin pies in the market.

[fol. 1045] By Mr. Alioto:

Q. Yes. Well, I'm excluding mince and pumpkin from the question. If I exclude it from the question you would agree with me, would you not, that in the literature you have read the anti-competitive device of these exclusive dealing arrangements is that the independent is precluded from dealing in the one area where he has greater and better location?

Mr. Lamb: Your Honor, I object again on the grounds that it calls for a legal conclusion.

The Court: The objection is overruled.

The Witness: I can't answer the question on the basis that I'm not familiar enough nor do I pose as an expert in the field of antitrust. I pose as an expert as an economist in determining the nature of a competitive market.

By Mr. Alioto:

Q. That's what I'm talking about is a competitive market. I'm talking about the economics of a competitive market, and would you not agree with me that an exclusive dealing contract, assuming there be one—

A. Your asking me to interpret whether this is in violation of some act?

Q. No, I am not asking you to determine whether anything is in violation of anything, Doctor. I'm asking you for an economic opinion as to whether or not the device of the exclusive dealing arrangement in a competitive concept is that the independent regional manufacturer as just opposed to a national concern is thereby precluded from negotiating a smaller contract covering his region which would maybe otherwise be made possible by reason of his efficiency in that particular region?

Mr. Lamb: I object on the grounds that it calls for a legal conclusion.

The Court: Overruled.

The Witness: The answer to that would be, yes.

By Mr. Alioto:

Q. Thank you. Now, if that did exist in this market and if the jury found it to exist in this market, then that would indicate that competition is not entirely free, wouldn't it?

A. It would be less than free. It would be less than perfect; it would have some elements of imperfect.

[fol. 1046] Q. Do you know in the study of the antitrust literature, I take it, you've heard of the expression the "high leg" and the "low leg" of a price structure, or have you?

A. I'm not familiar with this.

Q. You know about two price systems?

A. Certainly.

Q. In other words, where a higher price is charged in one area and a lower price in a more competitive area; you know that?

A. Yes.

Q. Now, if it were the fact, Doctor, if it were the fact, that in a two-price system of these defendants, the high leg of the price was right at their plant and the low leg of the price was 750 miles away from the plant, would you say that that indicated competitive pricing as against predatory pricing?

A. Yes.

Q. That it indicated predatory pricing, is that your answer?

A. It indicated less than perfect pricing.

Q. Yes. It's an unnatural pricing, isn't it?

A. It would be unnatural for that company.

Q. Sure. Now, suppose three companies, three companies, three national companies, having a dollar or sales volume, we'll say, in 1961 on frozen pies of $12,800,000 for one, $,600,000 for a second, and $15,100,000 for a third; suppose three companies at about the same time each had a two-price system where the high leg of the price was located right by the plant and the low leg of the price was located we'll say, in Salt Lake City, wouldn't you agree with me that that is evidence of infinitely less than perfect competition?

A. I don't think it means it's infinitely less. It means it's less.

Q. It's certainly evidence of collusion, isn't it?

A. No. Collusion is something entirely different than uniform action.

Q. Are you saying that uniform unnatural price action is not evidence of collusion, is that what you were saying?

A. It doesn't prove collusion.

Q. Is it evidence of collusion.

A. Some evidence.

* * * * * * * * *

[fol. 1047] Q. In your study of the antitrust literature, the study about which my friend, Mr. Lamb, qualified you, did you make any kind of an intensive study of zone pricing?

A. I was not qualified as studier of the antitrust literature, as you imply it. I'm an economist, not an antitrust lawyer.

Q. No, no, no. I don't mean a lawyer. You are an antitrust economist, are you not; you are an antitrust economist?

A. I'm not an antitrust economist.

Q. Let me put it this way. You were qualified, were you not, as an expert on the question of economic competition?

A. Right.

Q. Well, that's what I'm talking about. Now, in your studies of economic competition, your historical and current studies on economic competition, I take it that you have done some considerable study about price zones by national companies?

A. My work has been more in the field of agricultural products, and I've been concerned with interregional competition of a product that is more nearly a competitively priced product and not so much in the manufactured area in these zone pricings.

Q. Well, then, you do not consider yourself an expert of the competitive effect or the competitive implications of zone pricing, is that it?

A. I'm—this is in the area of an imperfect area rather than in the perfect competition area, would be the distinction I try to make here. That I have been dealing with products that are more nearly priced in the perfect market but where there is a good deal more competition than there is in what you call the industrial area.

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Cross examination.

By Mr. Schafer:

Q. You were asked, Dr. Anderson, about the relevant competitive market, and I think you testified that Denver would be a relevant competitive market for a plant located in Salt Lake City, is that correct?

A. I said this is an area that they would probably try to expand their sales. Whether they could compete in that market would depend, as I said, on the costs of the raw materials and the costs of transporting them as against the costs of transporting the finished product to these markets. It's a matter of economics as to whether this is a market they can compete in or whether they can't.

[fol. 1048] Q. Well, what did you understand counsel to mean by the term "relevant competitive market?"

A. Well, I thought that he was meaning what markets would these companies have relatively equal costs including all economic factors, transfer costs, costs of raw materials and so forth. I think this is getting into an area dealing with the cost aspects which I didn't study in this particular suit, and I don't know what the actual costs were. This must be determined by others who will supply data in this area.

Q. Well, let me see if I understand you. Were you saying to counsel that assuming approximately equal production costs the Denver market, say, would be a market which you would expect the two companies, one located in Salt Lake, another located in California, to have equal access to, is that what you were testifying?

A. Not necessarily as depending on their costs of getting the product to the Denver market. The rail rates and so on are not necessarily on a distance basis. The rail rates are established. I don't know but what it's as cheap to transport pie from San Francisco—or Los Angeles to Denver as it is from Utah or nearly so from Utah to Denver. To say that these are equivalent markets or equal cost markets, I have no way to know this. I haven't studied this aspect.

Q. Do you know whether or not there is any relationship between price in Denver, say, and in Salt Lake City?

A. No, I haven't studied it.

Q. Or as between Seattle and Salt Lake City?

A. I haven't studied these data. I've studied for the Intermountain market only.

Q. Am I correct in understanding that in your testimony you weren't intending to imply that this was all one marketing area in terms of price?

The Court: Well, now, Mr. Schafer, I'm going to have to interrupt you. This is your witness.

Mr. Schafer: Well—

The Court: No well about it. The evidence is that Pet, Morton, Continental and Carnation hired him to make this study. And we had an arrangement here at the beginning of this trial that one of you would examine your own witness. I permitted you all to cross-examine Mr. Alioto's witnesses. Now, what you're doing is cross-examining your own witness. I think it's highly improper.

Mr. Schafer: I honestly didn't know what he meant by the term "relative competitive market."

[fol. 1049] The Court: Well, I think I won't permit you to pursue it.

Mr. Schafer: All right. May I ask one or two more questions, sir?

By Mr. Schafer:

Q. Do you know whether or not in Los Angeles, say, sir, do you know whether or not anybody has 70 percent of the market in Los Angeles?

A. I don't know anything about the market in Los Angeles.

The Court: Well, now, you misunderstood my position, Mr. Schafer. My position was that I thought our arrangement was that one of you would examine the witness so that everybody wasn't examining the same witness where it's your witness. This is supposed to be redirect.

Mr. Schafer: Well, we have tried to accommodate to that, your Honor. I thought we did a pretty good job, and I only have a couple of questions to clean up in my own mind what the witness meant by his testimony.

The Court: All right.

By Mr. Schafer:

Q. My other question, sir, was in relation to your testimony respecting counsel's question as to high leg pricing versus low leg pricing, and my question to you was simply whether you knew what the market conditions were, say, in the California market in terms of price?

A. I didn't study this. I studied only the Intermountain market, pricing in that market only.

Q. If you did have a pattern of, say, high pricing in California as against low pricing in Utah, could that be the effect of normal competitive conditions as they differed between the California market and the Utah market?

A. It could be.

The Court: Any further questions of this witness?

Mr. Lamb: I have no further questions, your Honor.

Mr. Schafer: Your Honor, I had about two minutes worth of questions in connection with a matter that came up yesterday.

The Court: Well, now, you're cross-examining your own witness.

Mr. Schafer: No, I'm not cross-examining, your Honor. [fol. 1050] The Court: Well, it sounds like cross-examination to me.

Mr. Schafer: I wanted, your Honor, to have the witness explain his answer yesterday which was left not fully explained by reason of the fact that the jury was dismissed and I discussed it with your Honor in Court, of course, but the jury did not hear the evidence on that matter.

The Court: Well, that was part of the argument out of the hearing of the jury on the motion, and I don't think I want to have that now produced before the jury. That's why we had the argument out of their hearing so they wouldn't hear it. Now, you want to go into it.

Mr. Schafer: May I say something, your Honor?

The Court: Not on that subject, you may not.

Mr. Schafer: Just to you, not to argue it, but just to say what I wanted to do and why.

The Court: You mean come up here and talk to me about it?

Mr. Schafer: Well, I don't mean privately. I just wanted to say why—

The Court: Oh, you just want to tell the jury about it?

Mr. Schafer: No, I don't want to tell the jury about it. I don't want to argue the fact. It seems to me, your Honor, that there were some charges made against me yesterday.

The Court: Oh, no, I'm not going to let you go into that.

Mr. Schafer: Not for my own personal reasons, but I think that Morton is entitled, your Honor, to be represented in this court by somebody that the jury can believe in and trust. And I've done my best to do that job here in this court.

The Court: All right. We'll accept your statement on that.

Mr. Schafer: Well, I'd like to have the witness explain, if he would, your Honor, what the facts were in relation to that matter yesterday.

[fol. 1051] The Court: Your request is denied.

Mr. Schafer: All right.

Mr. Alioto: We have no further questions.

Mr. Schafer: I wonder if I could show this telegram to the jury?

The Court: It's in evidence, isn't it?

Mr. Schafer: Yes.

The Court: Then I suppose you want to say something about it.

Mr. Schafer: I want to say something that the record shows, your Honor, in regard to this telegram. There was a lot of talk yesterday about this telegram.

The Court: Your request is denied. All of that discussion out of the presence of the jury you want to revive. You open it up and somebody else is going to continue it, and so we have the argument all before the jury and it's none of the jury's business on that subject.

Mr. Schafer: I didn't mean to argue anything, your Honor. I hoped you understood that. Just to get the facts in.

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[fol. 1052] ALAN WALTER STEWART YOUNG, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lamb:

Q. Will you state your full name, please, sir?
A. Alan Walter Stewart Young.

Mr. Schafer: May I interrupt just a second, your Honor. This is a witness which covers a lot of ground, and we did hope at least two people would interrogate this witness briefly, both of us? If not—

The Court: I don't see any reason why this witness should be subjected to two interrogations by you people. Let Mr. Lamb proceed and when we get through we'll take a look at it.

By Mr. Lamb:

Q. Where do you live, Mr. Young?
A. In Walnut Creek, California.
Q. By whom are you employed?
A. Safeway Stores, Incorporated.
Q. In what capacity are you employed?
A. I'm manager of the frozen food department?
Q. How long have you been in that capacity?
A. Twelve years. Excuse me, fourteen.
Q. Is part of your duties as manager of the frozen food department the purchase of frozen pies?
A. For our own label, yes, not for any other label.
Q. For what label is that?
A. Bel Air.
Q. Do you know Mr. Gaylen Rigby of the Utah Pie Company?
A. Yes, sir.
Q. Is he is in the courtroom?
A. Yes, he was.

Q. How long have you know Mr. Rigby?

A. I think the first time I met him was in '58 when I visited their old plant.

Q. State whether or not since 1958 you have inspected the Utah Pie Company's plant?

A. Yes, I was there again in '58 at their new plant. They built a new plant and I visited that plant.

[fol. 1053] Q. Have you had any visits since 1959?

A. Not to the plant.

Q. State whether or not at any time you ever told Mr. Gaylen Rigby that he was to pack fruit pies for Safeway under the Bel Air label?

A. No, I never did.

Q. Who owns the Bel Air label?

A. Safeway Stores.

Q. Do you know Mr. Boyd Schenk of the Pet Milk Company?

A. Yes, I do.

Q. Do you know Mr. David Dittman of the Pet Milk Company?

A. Yes, I do.

Q. State whether or not at any time that Mr. Dittman or Mr. Schenk or any other employee of the Pet Milk Company ever tried to influence or interfere in any manner with your negotiations with the Utah Pie Company?

A. No, they never did.

Q. State whether or not you are aware of the fact that in June of 1960 Mr. Boyd Schenk went through the Utah Pie plant in Salt Lake City and concealed the fact that he was an employee of the Pet Milk Company?

A. I was not aware of it until I saw the transcript last Friday. It was complete news to me.

Q. State whether or not Mr. Dittman or any other employee of the Pet Milk Company ever spoke to you about the conditions within the Utah Pie plant?

A. No, he never did.

Q. State whether or not you encouraged your sales division to stock 8-inch Pet-Ritz fruit pies?

A. I pointed out to them the advantages, freight savings they could make by shipping Pet-Ritz pies together with Bel Air. At one time we had only the four flavors and there were other varieties that we did not have under Bel Air which they were buying in smaller quantities, the slow moving items. So they could save freight by shipping the two brands together. But this was merely—I pointed out to the division. I have no authority to tell them what to do.

Q. Do you as director of the frozen food department of Safeway Stores have any control over the brands of frozen fruit pies that the Safeway Division managers purchase for their individual retail stores?

A. No, none whatever. I have to sell them on Bel Air. They don't have to stock it.

Q. They do not have to buy Bel Air pies from you?

A. No.

Q. Is it a fact then that they are autonomous in their purchases?

A. Yes.

Q. Could they enter into a private label contract with a regional producer of frozen pies?

A. No. No, the private label is centered for the simple matter that we have to buy all the cartons and be sure the ingredient statements are correct, and generally have more knowledge of frozen food than the individual buyers do in other divisions.

[fol. 1054] Q. Is the Safeway Corporation under its contract with the Pet Milk Company bound to buy all of its Bel Air pies, fruit or pumpkin and mince, from Pet Milk Company?

A. No.

Q. Have you ever purchased fruit pies from any other frozen pie producer?

A. I have not for the Bel Air label, no.

Q. Have there been any companies try to obtain the frozen fruit pie business from the Safeway Company?

A. Yes.

Q. Will you please name those companies?

A. Well, Utah Pie Company, Morton Division, Continental Baking, Carnation Milk Company are the main ones that have really pushed and solicited the business.

Q. Why has the Safeway Company not contracted with the Utah Pie Company to give them fruit pie business in the Salt Lake City area?

A. Well, it's been mainly a matter of quality and quality control. I have put a great deal of time and effort and money into maintaining a quality reputation for the Bel Air line, fruits, vegetables, juices and pies. This is one of the reasons I was attracted to the Pet Milk Company in the first place and selected them as our first supplier. I've looked into several others, Utah Pie Company included, particularly because of the freight savings to the Salt Lake market. But the more I checked into it the more I was satisfied in my own mind the quality would not be equal to the quality we had, and certainly not on a uniform basis because they have practically no quality control procedure at all.

Q. Are you aware of the testimony of Mr. Gaylen Rigby in this case that you agreed with him that you would give him some fruit pie business?

A. I saw that transcript, yes.

Q. Is that true or false?

A. That is false. We did discuss the possibilities, but I never promised him any business.

Q. Are you aware of Mr. Gaylen Rigby's testimony to the effect that you asked him to buy apples?

A. I saw that in the transcript, yes.

Q. Is that statement true or false?

A. It is false.

Q. What is the duration of the contract between the Pet Milk Company and Safeway?

A. Originally it was a year, with some provisions for canceling on either side, and then it was renewed for another year. Since then we haven't even signed one. We have just gone on. It is wide open. We could cancel it on a week's notice if we thought it was good business.

Q. It is cancelable on a week's notice?

Q. Well, I say—there is nothing in there about a notice. Actually, we have no contract at the present time.

Q. Are there any frozen pie companies contacting you presently trying to get the Safeway business?

A. Yes.

[fol. 1055] Q. Who are they?

A. Carnation and Morton.

Q. Has the Utah Pie Company approached you?

A. Not recently.

Cross-examination.

By Mr. Schafer:

Q. Have these negotiations with Morton, sir, been serious enough to cause you to visit the Watsonville packing plant?

A. Yes.

Q. Would you say, sir—if I understand it correctly, the Bel Air label has a 3-ounce crust?

A. That is right, top and bottom, three—excuse me. Three and a half top and three and a half bottom.

Q. Can you tell us whether or not it takes longer to run a crust through a machine, that is, a 3½-ounce crust, than a bigger crust, a thicker crust?

A. Yes. It partly also depends on the texture of the crust, how tough it is. The tougher and thicker it is, the faster you can run it.

Q. In order to run a Bel Air pie through a machine, would you have to run it slower than a Morton pie?

A. Yes.

Q. As a seller, sir—if I understood your testimony correctly, you, in effect, sell your Bel Air pies at the local Safeway Division?

A. Yes.

Q. As a seller, sir, do you insist upon a premium, if you will, for your 24-ounce pie, as against the smaller pies that are in the market?

A. I don't insist, and I sell it for basically what it costs me. And in many cases it is higher than the lower—than the 20-ounce or 22-ounce pie.

Q. So you get a better price for your pie than a 20-ounce pie, say?

A. Yes, because it costs more.

* * * * * * * *

Cross-examination.

By Mr. Alioto:

Q. Mr. Young, during the course of your direct examination, I believe you said that you were sent certain materials to read, is that correct?

A. I saw the transcript, three pages in the transcript, of Mr. Rigby's testimony. It was sent to our Legal Department, and they showed it to me.

Q. I see. Before coming to Salt Lake City did you review your file in this matter, Mr. Young?

A. Some of it.

Q. And did you take the file with you to Salt Lake City?

A. No.

Q. What did you review in your files?

[fol. 1056] A. Oh, just refreshed my memory on some of these facts. For instance, I confirmed that I did have a meeting with Mr. Rigby in June of '60.

Q. Did you also check your calendar to determine on what dates you had meetings with Mr. Harsha, Mr. Schenk, or Mr. Dittman?

A. No, I didn't know anything about this testimony on that. I have had many meetings with them, so I don't know the dates.

Q. And those are the only materials you have read before coming to court?

A. No. I have seen some of the other testimony since I got here last night.

Q. What time did you arrive last night?

A. 8:30.

Q. Were you shown Plaintiff's Exhibit 47, which purports to be an inter-office memorandum of the Pet Company, relating to a meeting held between you, Mr. Boyd Schenk, and Mr. Harsha?

A. These are the notes that Mr. Harsha made?

Q. Yes.

A. Yes, I was shown that.

Q. Did you read it?

A. I did.

Q. And did you discuss the points set out in that memorandum with anybody last night other than your own attorney?

A. No. With Mr. Lamb I did, a few things, yes.

Q. Did the memorandum correctly set forth the facts?

A. No, not entirely.

Q. Was it in error?

A. Well, yes, some of it. In other words, the part where he said I would—I don't know the exact wording, but tell the divisions to stock other brands, because I have no authority to do that, and I explained that to Mr. Harsha at the time. We did discuss this. He explained to me the advantages of freight savings if they were combined, and I said I would point this out to our division. It is part of my job to tell other divisions of any economies they can make, but it is not my job to tell them what they can stock or what they should stock. In fact, they would resent it if I did.

Q. Did you agree to write a letter to each of your Safeway Divisions requesting help on behalf of the Pet Milk Company, re-emphasizing the advantages in freight savings by pooling Pet-Ritz with Bel Air brand?

A. No. Only the last part is true.

Q. Did you agree to write a letter?

A. Yes, I said I would write a letter to any divisions where I thought there would be an advantage in saving freight.

Q. Then you agreed with Mr. Harsha on that occasion that you would do that, didn't you?

A. To point out the freight savings, yes.

Q. Did you agree to act as a door opener for the sales people of the Pet-Ritz Company?

[fol. 1057] A. No. Only in the sense that with this additional information and background they might accept or listen to them a little more freely, but the door is always open to any supplier. This is not necessary.

Q. Did you agree, Mr. Young, to encourage the Safeway Sales Divisions to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz?

A. No. Just where these freight savings would be available to them. May I explain that a little further?

Q. You may say anything you want, sir.

A. We had at that time only four flavors, the four big volumes ones, apple, cherry, peach, and boysenberry. Our divisions were stocking the slow-moving pies, like pineapple, apricot, blueberry, and other brands, and consequently they had to buy in small quantities and pay a small-quantity price. The leading brands have different prices for different quantities. But if they bought with our volume and shipped together, they could then legally get the truck load price on maybe only 400 cases of Pet-Ritz brand by combining and shipping to the same point. I just pointed this out to our divisions.

Q. Do you remember a discussion that you would encourage your divisions in this fashion, particularly where your divisions were stocking a pie that competes with Pet-Ritz? Do you remember that discussion?

A. No, but if they were already stocking Pet-Ritz, it would be logical I had nothing to point out to them. If they weren't stocking Pet-Ritz, then there was something to point out to them.

Q. Then I take it the following statement, in substance, is true, the following statement which purports to set forth what was discussed on the day of July 14, 1959, namely:

"In other words, Young will act as our door opener for our sales people, particularly in the case of 9-inch fruit,

creams, custards, and 8-inch fruit flavors not produced under the Safeway Bel Air label.

"In addition, Young will encourage the Safeway Sales Divisions to stock Pet-Ritz flavors of 8-inch fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz both in quality and price."

I take it from your testimony, Mr. Young, that that statement of the agreement between you and Mr. Harsha is correctly set forth in this memorandum?

[fol. 1058] A. No, it is not true, and I have explained this is not true.

Q. You say this is not true?

A. That is not true in a whole. I have explained this is not true.

Q. Would you explain—

A. It is his interpretation.

Q. Would you be good enough, sir, to read that and tell me which part of it is not true?

A. All right.

Q. Beginning, "In other words, Young will act as a door opener—"

A. That is his interpretation. We do not need to open the door to get into Safeway. Any supplier can go into any Safeway Division by appointment or on a merchandising day, buyers' day, to see them. So the "door opening" is not true. It is not necessary. This is his own interpretation to himself, as I see it. Particularly in the case of 9-inch fruit, creams, custards, and 8-inch fruit flavors not produced. This would be true in the sense that these are the pies which we don't have under the Bel Air. Ours is the 8-inch fruit.

Q. So that portion of it is correct?

A. So naturally there was no point in telling them, or suggesting to them, that there was any freight savings by combining, say, Pet-Ritz apple with Bel Air, because they already have the Bel Air apple going there.

This would be true in that those were the flavors we would be considering.

"In addition, Young will encourage the Safeway Sales Division to stock Pet-Ritz flavors."

No, I wouldn't encourage them to stock it. I was going to point out to them the advantages to them if they combined the shipment, which they could do with Pet-Ritz and Bel Air, which they couldn't with, say, Carnation and Bel Air, coming from different points.

". . . stocking a pie that competes with Pet-Ritz. Young will send me a blind copy."

That is his idea.

Q. We haven't come to the blind copy yet.

A. All right.

Q. Then, you have said everything that you regard as not true and those things you regard as true so far as that particular portion of the memorandum is concerned.

A. That's right.

Q. Now, then, the next one states:

"Young will send me a blind copy of the letter that goes to each Safeway Division, with the understanding our men are not to quote this letter."

[fol. 1059] State whether or not you and Mr. Harsha had that discussion on July 14, 1959.

A. I believe that he asked me to send him a carbon copy, but I didn't agree to send him one, and I didn't send him one.

Q. What is this business about a blind copy, as distinguished from a carbon copy?

A. Maybe this is the way he put it at the time. I said I didn't agree to send him one, and I didn't send him one.

Q. But you didn't have any discussion about sending him a blind copy?

A. I think he asked me for a copy of the letter.

Q. Did he ask you for a blind copy?

A. It could be. I don't remember now.

Q. Why would you send a blind copy to a man regarding business of the Safeway Company if you were going to send the original of the letter to some man in your own organization?

A. Well, they—I imagine why he asked for it to be blind, if he did, was that our buyers in the divisions would resent it if I was pointing out and working with him on this, pointing out to Pet-Ritz, giving them information that I was writing to our divisions, I don't know.

Q. Why would you want to do something with Mr. Harsha that the buyers in your own division would resent, Mr. Young?

A. I wouldn't. They don't like me telling them what to do. I have to be careful. They are my customers. I have to be careful that I only give them information. I don't interfere with their judgment as to what they should stock. But, as I say, this Mr. Harsha put in his own notes, and I don't know why he put it in, but I am just guessing. You are asking for an opinion.

Q. I take it you regard Mr. Harsha as a rather intelligent man, don't you?

A. Yes, I do.

Q. As a man who is well versed in the arts of language, who understands language?

A. Yes.

Q. Then it states:

"Schenk will advise as to the sizes and/or flavors by Safeway Sales Division on which we need support."

Did you agree with Mr. Harsha on that occasion that you would hear from Mr. Schenk about this and then transmit it to your divisions?

A. I think what he was going to do was to point out to me where their brand was not being stocked. As I say, there was no point in my writing to divisions that were already stocking Pet-Ritz and pointing out a freight savings they were already getting, they were already shipping together.

[fol. 1060] Q. He was going to point out to you what your own organization was doing?

A. I don't have those sales figures. They buy indirectly —independently, and I don't know unless I visit a division and talk to them, I don't know what their sales figures are in the other brands.

Q. Did Mr. Harsha state that he would give you anything in consideration for your doing this for them?

A. Good heavens, no.

Q. Do you remember on that occasion that you discussed the matter of renewing your contract or of negotiating your contract?

A. I believe we did, yes.

Q. Do you remember that some kind of an agreement was made with respect to 6½ cents per case in all areas where an allowance was effective?

A. I don't recall that detail now. I saw it in the memo last night, but I don't remember the details now. There was some adjustment for some competitive reason there that I recall, but I don't recall the facts.

Q. When you say "adjustment," do you mean a lowering of your price by 6½ cents a case?

A. No. I think originally there was a differential between Pet-Ritz and Bel Air, and it was changed, so they asked us to lower the differential because of competitive reasons. We agreed to adjust the price so we wouldn't get as low a price as we could have done otherwise. I don't, frankly, recall the details of that right now, and I saw it last night, but I don't recall it.

Q. Do you remember any discussion at that time, Mr. Young, about changing the contract so that you would be precluded from going to competitive pie manufacturers?

A. No, we—

Q. Was there any discussion?

A. We discussed the contract, some of the contract terms, but there would be nothing in the new contract, or the old one, for that matter, to prevent me from going anywhere else. We did guarantee a minimum, because they

had to buy some new equipment to take care of our production and demand, and they weren't willing to do that, and I don't blame them, without some assurance of a minimum quantity, which, as I recall, was a million cases. But our requirements, conservatively, would have been a million and a half. So I could have bought the other half a million where I wanted.

Q. Don't you remember a discussion that you would delete from your contract a provision which would have permitted you to go to other pie manufacturers in the event that Pet couldn't supply your requirements?

A. Over and above a certain quantity. I saw that there, but I don't recall that part of it. But that was never in a contract, I know that.

[fol. 1061] Q. When you say you saw that there, do you mean—

A. In that memorandum that you put in evidence.

Q. Do you mean you reviewed the letter which Mr. Schenk wrote you?

A. No. I mean the memo—

Q. On January 6?

A. I mean the private memo that Mr. Harsha wrote, that you just showed me. I read that last night, and that's where I saw this piece that you are talking about now. But this was not part of our final contract.

Q. Then you recall that you did discuss that subject matter with Mr. Harsha?

A. No. I recall that we discussed the contract in general, but this is back in '59. I don't recall the exact details. I do know that we never agreed to this complete exclusion, and we never have, and it is not in the contract.

Q. Let me read you, sir, the letter of January 6, 1960, to you from Mr. Schenk. You, of course, received that letter, didn't you?

A. I presume so. I don't know. Which part do you want me to read?

Q. I am going to read a portion of it.

"In Paragraph 4 of the amended contract we have deleted completely the sentence 'If seller is unable to deliver

the two million case quantity, buyer shall have the right to procure supplies from other packers in the amount seller is unable to deliver.'"

Do you remember that that was in that contract, Mr. Young?

A. It was not in the contract. This is a draft which he is submitting here for us to approve, and which I then sent over to our Legal Department for their advice. In this letter, yes, but that is not in the contract. And we have never felt limited or ever agreed to any limitation.

Q. When he states that he deleted a portion or a sentence that was in the contract, in what contract is he deleting it from? From which contract is he deleting it?

A. What he is enclosing. "I am forwarding newly revised contract for your signature."

This is a draft contract, which I had not yet seen and had not yet approved. But, as agreed in that meeting, he was to draft the contract and then submit it for my approval. And I don't approve a legal document like that. I send it to the Legal Department and then I also approve it from the factual point of view.

Q. Is it that they requested of you that you not deal with competitive pie manufacturers?

A. No.

[fol. 1062] Q. Unless they were not able to supply it? Did they request it of you?

A. Not to my knowledge.

Q. How did that language get in there, then, Mr. Young?

A. I don't know.

Q. Either you put it in or they put it in, that is correct, isn't it?

A. Yes, they put it in the draft.

Q. So that Pet proposed to you that you should not buy from a competitive pie manufacturer so long as they could supply up to two million cases, is that correct?

A. They wanted—I presume they wanted a two million case guarantee, and we were not willing to give them that.

Q. Let me get at it this way, Mr. Young. Did Pet propose to you a provision which would read as follows:

"If the seller, Pet-Ritz, is unable to deliver the two million case quantity, buyer shall have the right to procure supplies from other packers in the amount seller is unable to deliver"?

That was proposed to you, wasn't it, by the Pet Company?

A. Well, it is right here in a letter, so it must have been. Frankly, I don't recall this, but the way I would interpret it, in recollection, is that they wanted a two-million case guarantee, and then we could go elsewhere for more. But I was not willing to give them a two million case guarantee. I guaranteed them a million.

Q. Do you remember any of the discussion about that?

A. No, I do not.

Q. You actually made an estimate, didn't you, that your requirements would be between one and two million cases?

A. Yes.

Q. Have you, during the period of that contract, purchased Bel Air pies of the fruit variety, not including pumpkin or mince, from any other competitive pie manufacturer?

A. No. But this contract covered pumpkin and mince also. You can't separate them. In my mind they are all one.

Q. I am separating them for the moment, and then you can say anything on that subject you want, but for the moment I would like to direct my questions on that ground.

A. All right.

Q. It is agreed that throughout the life of that contract you have not had a competitive pie manufacturer make you a fruit pie, other than pumpkin and mince, except the Pet Milk Company, is that correct?

A. The Bel Air fruit pie.

Q. Yes.

A. Yes.

Q. How long has that contract been in existence?

A. The contract itself was written for a year, and I believe it eventually was written starting January 1, 1960, or something like that.

[fol. 1063] Q. Yes, and it provides—and I am reading this—

"This contract shall become effective as of January 1, 1960 and shall terminate on December 31, 1960, or later date if extended beyond that date by written agreement of the parties."

A. It has never been extended.

Q. Has it ever been extended?

A. No, not by written agreement. We have just gone on.

Q. Is the contract terminated, or is that contract still in existence?

A. Well, I guess that's a legal matter, whether we could either of us sue each other on the terms of that. As far as I am concerned—

Q. I am not asking whether you are suing. As a buyer of the company, do you think you have a contract with the Pet Company?

A. No.

Q. Then the terms of this contract are no longer applicable, is that what you are saying, with respect to pricing and with respect to escalation and with respect to these other matters?

A. Yes.

Q. They are applicable?

A. No. I would say—in fact, I don't even remember what is in there. We are just operating on a daily basis. They produce as we send them shipping instructions, or just ahead of shipping instructions, and we ship. And their pricing is competitive, and that's it.

Q. While you have not purchased, as you say, any other competitive pies, fruit pies, excluding pumpkin and mince —while you haven't purchased, it is a fact, is it not, that you have received an offer to manufacture fruit pies for

you, specifically, apple, cherry, boysenberry, and blueberry, at prices less than you were paying Pet?

A. This is true.

Q. And you received that offer, have you not, among others, from the Utah Pie Company, the plaintiff in this case?

A. That is true.

Q. And you received that offer approximately April 4, 1960, didn't you?

A. That I don't remember the date.

Q. Let me show you a letter.

A. Yes.

Q. It is in evidence in this case, put in by the Morton Company, and it is M-71 in evidence.

A. Yes.

Q. Did you receive that letter?

A. As far as I know, I did, yes.

Q. All right. That letter reads—incidentally, what is the Whitney Frozen Food Company?

A. That is the name we used to operate under. It is now the Frozen Foods Department, which is exactly the same.

Q. It was a Safeway Division?

A. That's right.

[fol. 1064] Q. Was it a separate company or just a Safeway Division?

A. Just a name.

Q. Just a name.

A. Right.

Q. This letter reads:

"On April 4, 1960—" And you recall your contract is January 1, 1960, effective for at least a year?

A. Yes.

Q. "Referring to our telephone conversation of Friday morning, April 1st, and to your request for a quotation on our frozen pies to be packed under your private label 'Bel Air,' we give you the following quotation based on our regular formula."

Q. Now, do you remember that telephone conversation between you and Mr. Gaylen Rigby?

A. I know I have talked to him so—I don't remember the exact conversation.

Q. And he says, "And your request for a quotation on frozen pies under your private label."

A. Under his formula, which was a much cheaper formula than ours.

Q. Yes. Now, do you recall that you asked him to give you a quotation?

A. I probably did, yes.

Q. For a Bel Air frozen fruit pie?

A. Well, that's asking for a fruit pie at his formula. I asked for quotations from many people.

Q. Now, at the time that you asked for it, you were bound by a contract with the Pet Milk Company, were you not?

A. No, not to buy all our requirements. In fact, I didn't. I keep telling you we bought pumpkin and mince from Utah. That part of the contract for the same year.

Q. We are talking about fruit pies.

A. Now, we are talking about a contract.

Q. All right. Do you want to read that contract, the quantity you should purchase? "Buyers Estimated Annual Requirement for the Pies to be Manufactured and Packed Hereunder." Now, then you set that out in the appendix, do you not? The appendix is right here. It's marked for you. "And those estimated annual requirements."

A. Is this the actual contract that I signed?

Q. Well, you might look and see if it is, sir, so there will be no question about it. Is that your signature there?

A. Yes.

Q. All right. Now, those estimated annual requirements are the requirements set out, are they not, in Appendix A?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And you know, I take it, what the word "requirements" means?

[fol. 1065] A. We had a limitation here. That's what I was looking for. Yes, "Buyer agrees to buy from the seller a minimum of one million cases and a maximum of two million cases." Our estimated requirements shown here are two million cases or one million nine hundred-eighty, so I figured that gave me a leeway of anything over a million.

Q. As a businessman, Mr. Young, do you know what a requirements contract is?

A. I've heard of it, yes.

Q. What does it mean?

A. To buy our maximum requirements—I mean our total requirements.

Q. It means you buy your total requirements.

A. Yes.

Q. Now, then, with respect to the quotation you received from Mr. Rigby on N-71 on April 4 on apple pie, the quotation you received from him had a lower price, didn't it, than the price you were receiving from Pet-Ritz?

A. Yes, but this is a different formula. He said, "On our regular formula." Their formula was a much cheaper one.

Q. All right. You recall that the price, however, was much lower, don't you?

A. Yes, but I don't buy just on price.

Q. Did you then negotiate with Mr. Rigby after you were offered this lower price on his formula?

A. Yes. He came to visit me in June and we talked about it some more, and I asked him some more questions.

Q. Now, do you recall that he came to talk to you either on June 21 or June 22—and let me show you your exhibit, Plaintiff's Exhibit 90 in evidence, your letter to Mr. Rigby.

A. Yes.

Q. He talked to you on June 21 or June 22, that's correct, is it not?

A. Yes.

Q. He first tried to get an earlier date and you said that you were busy.

A. Right.

Q. And you agreed to see him on June 21 and June 22.

A. Right.

Q. And then he did come to see you on June 21 and June 22, didn't he?

A. Yes, sir.

Q. Now, hadn't you prior to the moment that Mr. Rigby sat in your office, hadn't you said to the Pet Milk Company people, personnel, in substance or effect, "The Utah Pie Company is the first processor I feel capable of producing for Safeway in addition to Pet?"

A. No, I'm sure I never said that because I never felt that way.

Q. Did you review that, did you review this document last night, the Schenk memorandum with Mr. Lamb?

A. No. What is that; Schenk to who?

Q. That's Mr. Schenk to Mr. Dittman.

A. No, no, I haven't seen that.

Q. I want to read this to you, Mr. Young. After having gone through the Utah plant, Mr. Schenk concludes as fol- [fol. 1066] lows: "As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied, and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves."

A. Well, I just disagree with him. There were a number of points.

Q. In other words, you never said in substance or effect to Mr. Schenk that you felt the Utah Pie Company was the first processor that you felt able to produce for you in addition to Pet Milk Company?

A. No, I did not say that.

Q. Do you know Mr. Schenk?

A. I do.

Q. Does he strike you as an intelligent fellow?

A. Yes.

Q. Does he strike you as a man who understands the meaning of language?

A. Yes.

Q. You will notice that this memorandum refers to a visit which is one day after Mr. Gaylen Rigby was in your office down in Oakland December 23.

A. Yes.

Q. And Mr. Gaylen Rigby saw you the day before, didn't he?

A. Or the day before that, yes, the 21st or 22nd.

Q. After Mr. Rigby saw you did you have any communication with Mr. Schenk or Mr. Dittman?

A. No. No, this is the first I knew of it when I got here that he had been through the plant.

Q. Who told you that?

A. I saw it in the testimony last night.

Q. Oh, you did read about this memorandum then?

A. I didn't read the memorandum. I heard this had come out in the trial.

Q. Whose testimony did you read last night in Mr. Lamb's room?

A. I read Mr. Harsha's testimony.

Q. And who else?

A. This morning I read Mr. Henzke's testimony, the Safeway man.

Q. Did you read Mr. Schenk's testimony?

A. No.

Q. After Mr. Rigby wrote you his letter of April 4 giving you his price quotations, did you have any contact with any of the Pet Milk people between that April 4 and the time that Mr. Rigby came into your office?

A. No. As far as I know, they didn't even know I was talking to him.

Q. Did Mr. Rigby quote any prices to you after those prices which he quoted to you on April 4 of 1960 so far as apple, cherry, boysenberry, and blueberry is concerned?

A. I think he has, yes.

Q. Did he quote additional prices?

A. Yes.

Q. Were they higher or lower than those?

A. I believe they were higher because then we started talking about our formula.

[fol. 1067] Q. Do you know a man named Shelburg?

A. In Safeway?

Q. Yes.

A. Gordon Shelburg, yes.

Q. Who is he?

A. He's one of our quality control inspectors.

Q. And he's one of the men who visited the Utah Pie plant in connection with your orders, was he not?

A. In connection with the pumpkin and mince order, yes.

Q. And he made certain reports to you, did he not?

A. Yes.

Q. About the quality control situation in the Utah Pie Company?

A. Yes.

Q. Has he ever told you that he informed the Rigbys that he knew of absolutely no reason why the Rigbys shouldn't be able to pack all kinds of pies, fruit pies, pumpkin and mince, for Safeway?

A. I didn't know he said that and he's not qualified to say that, either.

Q. Your quality control man is not qualified to say—

A. Well, may I explain that a little further?

Q. No, I'd just like you to explain—just a minute. Do I understand your testimony that Mr. Gordon Shelburg is not qualified to inspect a plant and determine whether or not that plant is suitable for the packaging or for the manufacture of Safeway pies?

A. Not on pies, no.

Q. What did you send him to the Utah Pie Company for, to look at something other than pie?

A. He was in Colorado and Utah to investigate—he mainly inspects canned fruits and vegetables. He was here. He was going to Salt Lake City. He said, "May I visit the plant and see the status of it." He's not the man who ac-

tually checks the product quality. Mr. Ted Roth, who is qualified, was the inspector who checked the pack during the pack.

Q. Then I understand that you sent a man named Mr. Shelburg to Utah to inspect the Utah Pie Company's plant because you felt he wasn't qualified to do it, is that right?

A. I didn't say that. The other men sent him to Utah to check canneries on canned fruits and vegetables. While he was here in Salt Lake City anyway he asked if he could visit the plant and get acquainted with frozen pies. He has not checked our frozen pies anywhere else at any time.

Q. You mean he was on a lark of his own when he went down to the Utah Pie Company or was he sent there?

A. He wants to learn something about the frozen food side of it. He's been on canned goods all of his life, and he's still responsible for checking canned goods. But since he was in the city he asked me, "Can I visit the plant and learn something about the pies."

[fol. 1068] Q. I see. He was just going there to be educated, is that it?

A. That's right, so that maybe later on he could be qualified.

Q. So that any statement he made to the effect that the Utah Pie Company was qualified to manufacture pies for Safeway was a statement you say was on his own, made on his own?

A. That's right, and he's not qualified.

Q. And you don't regard him as a qualified man in connection with that?

A. No, I don't.

Q. Is he still with you?

A. Yes.

Q. Is he inspecting pie plants for you?

A. No, just canned fruits and vegetables.

Q. Has he done any work at all on pie plants?

A. No.

Q. Do you know a Mr. Dittman?

A. Yes.

Q. Did Mr. Dittman tell you in substance or effect that his Mr. Schenk had been in the plant of the Utah Pie Company and observed certain things?

A. No, he never told me that.

Q. Did you ever discuss the Utah Pie Company with Mr. Dittman or Mr. Schenk?

A. Only insofar as that their importance in this market and their pricing in this market. We never discussed the plant or their production.

Q. You did discuss with Mr. Schenk and Mr. Dittman the importance and the pricing of the Utah Pie Company then, is that correct?

A. Yes.

Q. All right. State the times at which you discussed that.

A. I have no idea. It's been over four or five years we are talking about now. I don't know the dates.

Q. Well, was it around June of 1960?

A. No, not to my knowledge.

Q. If that was the time that you were negotiating with the Rigbys, wouldn't it be natural in your mind, Mr. Young, that this was the time that you also talked to Dittman and Schenk about it?

A. Later on I'm sure I did about the pumpkin and mince and told them that I couldn't even sell Bel Air pies, pumpkin and mince, produced by them in the Salt Lake City market because Utah's price was so low. And then I told them that I was planning to buy some from Utah for this reason.

Q. That you were planning to buy fruit pies from them?

A. No, pumpkin and mince.

Q. Well, did you ever discuss with these gentlemen the fruit pie offer of the Utah Pie Company?

A. Not their offer, but I've told them—and the Utah brand prices are well known, that their prices are very low in this market and that this is what we consider our main competition and it's pretty rough for us to meet that with Bel Air. I told them that several times over the years.

And they've always said, yes, they know it, but there's nothing they can do about it.

[fol. 1069] Q. And is that the full extent to which you discussed Utah Pie Company?

A. Yes.

Q. Is the state of your memory such that you can deny that you ever told them in substance or effect, "These are the only people that I feel capable of processing for Safeway other than yourselves?"

A. Yes, I'm sure I never said that because I don't believe it.

Q. In other words, this you can deny was said?

A. Yes, I can deny I said it. I don't know whether he said it.

Q. Yes. Now, then, there came a time that was December of 1960 when you wrote a letter, Mr. Young to Mr. Rigby in which you told him that you hesitated to give him a fruit pie order other than pumpkin and mince, do you recall that?

A. I don't recall the letter.

Q. Did you read this letter last night, your letter of December 30, 1960?

A. No. Yes, I wrote that letter.

Q. And did you read it before you came here?

A. No. I've forgotten about that. I remember it now, but I'd forgotten about it.

Q. Now, do you recall that at least on one of the fruit pies you had a quotation from the Rigbys that was lower than anything you were paying to Pet Milk Company?

A. Yes, that's probably true. I don't recall the figures.

Q. Now, do you recall that—well, do you recall the paragraph in the letter stating that you were concerned about the absence of any quality control in the Rigby plant?

A. Yes, this has been one of my main problems.

Q. Now, what is it you mean by quality control in that sense, Mr. Young?

A. Well, when you're producing millions of pies or hundreds of thousands of pies, unless you have a routine qual-

ity control established, checking all the way through the various ingredients and processing, temperatures and so forth, you've no idea what you're going to get and you can't get a uniform quality pie. They never took the temperature. They didn't even have a thermometer to take the temperature at any point out of the freezer or the temperature of the dough. In a pie all these things are important. They had no refractometer, which is an instrument you use to test the solids in a finished product, to see if you put too much sugar in or too little. I don't believe they even had an oven to bake off the pies at that time. They were baking them off in the stores when they had a demonstrator. They had no quality control personnel as such. There was no real quality control being exercised. Now, without this I couldn't have any assurance that the pies we would get out of there would be what we'd seen before.

Q. Have you even been in the Utah Pie plant?

A. Yes.

Q. When was it that you were in there?

[fol. 1070] A. Well, this was before this visit. It must have been in early 1959. I think it had been open a few months.

Q. Before Mr. Rigby saw you, is that it?

A. I believe so.

Q. Didn't Mr. Rigby tell you at that time and didn't he tell you subsequently that if he got anything like a million case order from Safeway that he would put a quality control system in that even you couldn't argue about?

A. If he said that it wouldn't mean anything because I certainly wouldn't start him off with a million cases.

Q. Didn't he tell you that?

A. I don't recall. He did agree to take some quality control steps if we gave him an order, yes. But in fact he didn't when we did give him an order. We gave him pumpkin and mince and there was no quality control.

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Q. Would you see Mr. Dittman about three or four times a year, is that the way it is?

A. Yes, two or three times.

Q. And where are these meetings generally held?

A. In my office.

Q. All of them in your office?

A. Yes. I've never been to his office.

Q. And in those three-or-four-time-a-year meetings have you discussed the Utah Pie Company other than as you have stated it?

A. No.

Q. And specifically you never told Mr. Dittman that as far as you're concerned Utah Pie is the only other producer that you would think of having produce Safeway pies other than Pet Milk Company?

A. No, I never said that.

[fol. 1071] Q. Do you recall a telephone conversation with Mr. Gaylen Rigby in about the autumn of 1960 about two or three months after your meeting in the office.

A. Not just on that statement, no. I don't know what you mean.

Q. Well, do you recall a telephone conversation in which he told you that the apple buying season was at hand?

A. Yes.

Q. And that if he was going to pack pies for your organization he had to go ahead and buy the apples now?

A. Yes.

Q. And didn't you tell him in substance or effect at that time, "Well, go ahead and buy the apples"?

A. No. I figured this is a suppliers problem to supply the ingredients later on. I never told him to go ahead and buy any because I hadn't agreed to buy any pies from him.

Q. Well, did you tell him at that time you'd have to buy them now and take your chances on getting my contract, is that what you told him?

A. No, I said I can't ask you to go out and buy fruit ahead of time. This is your problem later on if we do give you an order, but we haven't decided yet.

CHARLES V. BYE, called as a witness on behalf of Defendant Carnation, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billings:

Q. Mr. Bye, you already testified earlier in this case when you were called by Mr. Alioto and identified yourself as the controller of the Frozen Foods Division of the Carnation Company, is that correct, sir?

A. That is correct.

Q. Does the Carnation Company, Mr. Bye, in the regular course of business maintain IBM runs showing the volume of case sales of each flavor pie for each sales district?

A. Yes, we do, on a monthly basis.

Q. I will show you what has been marked for identification as Carnation Exhibit C-O, and ask you what that is?

A. This is the annual case sales for the years '57, '58, '59, '60, '61, and '62 taken from these same IBM runs for the Salt Lake City area.

Q. Was that prepared by you?

A. Yes, it was.

Q. Have you ascertained that the figures thereon correctly summarize the figures from these IBM runs?

A. Yes, they do.

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[fol. 1072] (The document marked Defendant's Exhibit C-O for identification was received in evidence.)

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By Mr. Billings:

Q. Now, Mr. Bye, I will show you what has been marked for identification Defendant's Exhibit C-P and ask you if this was prepared by you?

A. Yes, it was.

Q. And what is the source of the information on that exhibit?

A. Well, the source of the Carnation information is the previous exhibit, which is a summary of our IBM runs, and the source for the Utah Pie Company was Mr. Zimmerman's IBM run.

. . . . . .

(The document marked Defendant's Exhibit C-P for identification was received in evidence.)

. . . . . .

[fol. 1073] By Mr. Billings:

Q. Now, Mr. Bye, I will show you what has been marked for identification Defendant's Exhibit C-Q, and ask you what this is?

A. This is an IBM run which we prepared of all the invoices for the Salt Lake City office, by Carnation Company.

Q. For what period?

A. This is the period 1958 through 1961.

Q. Same period as is shown on the last exhibit, is that correct, sir?

A. That's right.

Q. And have you ascertained that this correctly reflects the information from all of the invoices for this area?

A. That is correct.

Q. Salt Lake City area?

A. Yes.

. . . . . .

(The document marked Defendant's Exhibit C-Q for identification was received in evidence.)

By Mr. Billings:

Q. Now, Mr. Bye, I will show you what has been marked for identification as Defendant's Exhibit C-R and ask you what that is?

A. This is a comparison I have made of the sales to the three largest buyers in this area by Carnation and by Utah

Pie, the three largest buyers being Associated, Safeway, and Utah Wholesale. The source for this information was again our IBM runs, which have just been put in evidence, and Zimmerman's IBM runs, which are already in evidence.

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[fol. 1074] (The document marked Defendant's Exhibit C-R for identification was received in evidence.)

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[fol. 1075] By Mr. Billings:

Q. Now, Mr. Bye, I will show you what has been marked for identification as Defendant's Exhibit C-S, and ask you if this was prepared by you?

A. Yes, it was.

Q. And what is the source of material on that?

A. The source of this material is the IBM run again for this area by Carnation Company.

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(The document marked Defendant's Exhibit C-S for identification was received in evidence.)

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By Mr. Billings:

Q. Now, Mr. Bye, I will show you what has been marked for identification as Defendant's Exhibit C-T and ask you what this is?

A. These are corrections I found in the pricing study made by Mr. Caldwell, due to various reasons. He forgot some deals, different prices; it is just errors I picked up in there that I have corrected.

Q. That is Exhibit M-8?

Mr. Alioto: This is a Morton exhibit. I have no objection to attaching it right to the exhibit. Morton put it in.

Mr. Schafer: I have no objection.

Mr. Billings: I offer this then, Defendant's Exhibit C-T, to be attached to Exhibit M-8.

The Court: All right.

(The document marked Defendant's Exhibit C-T for identification was received in evidence.)

[fol. 1076] By Mr. Billings:

Q. Now, Mr. Bye, have you had occasion to check the figures as shown on the IBM run on the invoices, which is Defendant's Exhibit C-Q, with the prices as are shown on these price charts which are in evidence, Exhibits M-17, M-18, and M-19?

A. Yes, I have.

Q. And do the prices, as reflected by the red line of Carnation Company, for the years 1958, 1959, 1960, and 1961 for apple pies, shown on these charts, accurately reflect the prices at which pies were actually sold?

A. They do, with the exception of that one error in 1958.

Q. What error is that? Would you point that out on this exhibit. Maybe we should hold it up this way. I will hold it if you will point out the error you discovered comparing the IBM run invoices with this chart.

A. We found this drop we have here, down to a price of 3, I believe it is, in the record. This is not true. This was not offered in Salt Lake City area, and it was a mistake. It happened in Los Angeles. And we discovered it when we made this IBM run.

Q. So there was no price drop by Carnation during 1958, is that correct?

A. No.

Q. Now, calling your attention, Mr. Bye, particularly to the two large exhibits, were pies sold by Carnation Company actually sold at the prices indicated by those red lines on the chart?

A. They were sold at each of the brackets, with the exception of two.

Q. Would you point out to the jury the points at which there were no sales against the prices quoted as shown on those exhibits?

A. I have made a note on the ones on which there were no sales. We have a point of 4.19—would you let me step down?

Q. Yes, why don't you step down and use the pointer.

A. I think I can reach it from here. This point right here. It is just a short period between—a week or two-week period where there were no sales at that point. There were also no sales on the next chart, 1961 chart.

Q. At which point, would you indicate?

A. This is March 18. That again, a very short period between the two pricing periods there.

Q. Other than that, there were sales at each of the prices?

A. Correct. Other than that there were from one to 40 sales at every single price.

Q. Mr. Bye, I will show you what has been marked for identification as Defendant's Exhibit C-U and ask if this was prepared by you?

A. Yes, it was.

[fol. 1077] Q. And what is the source material from which you prepared this exhibit?

A. From Mr. Caldwell's study that he prepared, which is already in the trial.

Q. Identified as Plaintiff's Exhibit 28?

A. That is correct, yes.

Mr. Billings: I offer Defendant's Exhibit C-U.

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Voir Dire examination.

By Mr. Alioto:

Q. When did you prepare this study, Mr. Bye?

A. It was prepared, I believe, just the other day, last weekend, or very recently, at least, anyway. I have been working on it since I have been here.

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Q. What is this? This is "Carnation Company, Salt Lake City Area, Gross Profit Summary."

A. This is all expenses that can be allocated directly to the Salt Lake City area to arrive at a gross profit and a net profit after contribution to sales overhead.

Q. Now, is this 1.10 net profit, for example—does this indicate you always—does this study indicate that you always sold at a profit in the Salt Lake City area, is that what it is?

A. At a profit before all overhead expenses.

Q. Oh, I see. No "Net Profit" doesn't mean net profit in the usual sense, does it?

A. Well, there's not particularly a usual sense. "Net Profit" can mean net profit after expenses. That's what it says.

[fol. 1078] Q. This is net profit before the application of expenses, is that it?

A. This is net profit after all directly allocable expenses.

Q. It is not net profit after all expenses, is it, Mr. Bye?

A. After all expenses that can be directly allocated.

Q. It is not net profit after all expenses, is it? Can you answer that question?

A. After all overhead expenses, no.

Mr. Alioto: If your Honor please, to put net profit on a document is just deceptive in this contest. I think they ought to take it off and make it very clear what it is. The jury might get this tomorrow and see "Net Profit," and assume that means net profit in the ordinary sense. And there is no designation that it is a net profit as we ordinarily understand net profit. That is my objection to it, if your Honor please.

The Court: Sustained.

Mr. Alioto: If counsel wants to write in "Net Profit Before the Other Expenses are Allocated," that is fine.

The Court: He will have to do that some other time. We are not going to stop while he fixes up his exhibit.

Mr. Billings: I think the witness has made it clear, your Honor, what he meant—

The Court: The objection is sustained.

Mr. Billings: Our next witness is Mr. Murphy.

The Court: Yesterday there was some question about Mr. Hereford's testimony, and I had the transcript brought

out for me. I will hand it to the clerk. If anybody is interested in that, there is the transcript.

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RALPH F. MURPHY, called as a witness on behalf of Defendant Carnation, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billings:

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[fol. 1079] Q. What are your duties in that connection with respect to frozen fruit pies?

A. Well, they would be to develop marketing programs for all areas, developing new products, packaging. That's about it.

Q. In that function, are you familiar with the pricing zones of the Carnation Company for its frozen fruit pies?

A. Yes, I am.

Mr. Billings: Perhaps we should turn this map this way, first.

(Defendant's Carnation's Exhibit C-V was thereupon marked for identification.)

Mr. Billings: Would you hold this over here, Mr. Handley.

By Mr. Billings:

Q. Mr. Murphy, does this transparency which has been marked for identification as Defendant's Exhibit C-V correctly represent the pricing zones of the Carnation Company for the Western area?

A. Yes, it does.

Q. During the four-year peroid, 1958 to 1961, were there any changes in the zones as shown by these lines?

A. Yes, I believe there was. I think originally we started

out with Zone 1, which was all of Califorina and Arizona, and I think Zone 2 was the area that is now shown as Zone 2, 2(b) and 2(a), and at different times it was necessary to separate them.

Q. But other than that temporary separation of Zone 1 into these subzones and Zone 2 into the subzones, they have been the boundaries, is that correct?

A. That's correct.

[fol. 1080] Voir dire examination.

By Mr. Alioto:

Q. Does that show that Utah, Idaho, and Colorado are in the same zone?

A. As it stands here they are not. They are in Zone 2, but we have had to separate them because of certain things going on in these different areas, so we gave them a 2(b) marking, the same thing as we did in Northern and Southern California and Arizona. We have 1 in Northern California, 1(b) in Southern California, and 1(a) in Arizona. Also in New Mexico, which includes El Paso, we have—now have a price list that we term 2(a), Zone Price List 2(a).

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By Mr. Alioto:

Q. Are you saying, Mr. Murphy, that there has been no change in the zones from January 1 of 1958 to the present, to '61?

A. The only change there would be in the zones was that we would separate Zone 2(b) from 2 because—or 2(a). For example, the one thing that comes to my mind in 2(a), that we do not show an ex-warehouse price in 2(a), where in the rest of them we show an ex-warehouse price.

[fol. 1081] Q. Let's stay with Utah, Idaho, and Colorado. Let me understand that. You are showing these as 2 and 2(b), is that correct?

A. Yes, sir.

Q. Do you have different prices within those zones?
A. Yes, sir.
Q. You have different price lists for those zones?
A. Yes, sir.

* * * * * * *

By Mr. Alioto:

Q. Forget the letter, then, and tell us when these zones were separated so as to separate Utah from Colorado, if you know.
A. I don't know the exact time actually.
Q. Can't you estimate it for us, approximately when it was?
A. It was done—I know it was during the period, but as to when it was done I wouldn't have any idea. As I pointed out to you, Mr. Alioto—

* * * * * * *

(The document marked Defendant's Exhibit C-V for identification was received in evidence.)

Direct examination (Continued).

By Mr. Billings:

Q. Now, Mr. Murphy, I show you what is already in evidence as Plaintiff's Exhibit 65, a group of price lists. They are captioned "Carnation Western Price Zone 2 Lists." And I will try to get out of the way so we can talk about the map and the list at the same time.
Now, look at one of these, say, for example, sometime in 1959 or 1960, which will be within the period of this lawsuit. I note, Mr. Murphy, that the price list has four different price brackets for each type of frozen food product. Would you explain what each of those price brackets signifies and how they were arrived at?
A. Yes, sir. Well, we have started with a full truck price and, by a "full truck price," we mean a full truck load of pies to one customer and one designation—or one des-

tination, and then we have a 7500-pound price, which is a quarter of a truck.

[fol. 1082] To the full truck price we have added 2 cents, and the reason we added 2 cents there is because we have to pay a stopover charge, and the stopover charge amounts to about 2 cents a case.

In the next bracket is a 250-case price, and again we have added 2 cents there to—for stopover charges.

The fourth bracket is what we term "Ex-warehouse," and that means if anybody went to the warehouse and picked up merchandise, they would receive the ex-warehouse price, and that's 8 cents a case over 250 case ex-truck price, the reason for that being that the Carnation Company pays for the warehousing of the merchandise.

I might also add that the 250-case price and the 7500 ex-truck price is merchandise that is delivered to the customer's dock.

Q. Now, what is the basis for the difference in price in each of those brackets as shown by this?

A. Would you state that again, Mr. Billings?

Q. What is the basis in difference in price? For example, here's a difference, say, on 8-inch pies as shown on this particular price list of 14 cents between the ex-warehouse and the full truck. Would you explain those differences?

A. Well, we start with a full truck price. In the price that I'm reading from it shows apple pies at $2.16 a case and then lists prices at the full truck price for the balance of the 8-inch fruit pies. And that's full truck price delivered to one destination. The next bracket is 7500 pounds, which is approximately a fourth of a truck, and we charged two cents more for that.

Oh, stop over charges go around ten or fourteen dollars per stop, depending on the area, and that two cents pays for the stop charge. The Carnation Company pays the stop charge. On a 250 case order, which again is delivered to the customer, we up charge 8-inch fruit pies six cents a case, and that again pays for the stop charge on a 250 case order. It takes a lot more orders at 250 cases to fill a truck,

which means that there is many more stop charges to be absorbed.

Now, in this particular price list on 8-inch fruit pies, the ex-warehouse price on apple pies again is $2.30. And the ex-warehouse price not only on apple but on all the rest of the fruit pies is eight cents higher than the ex-truck price. And that again is to pick up the cost of warehousing. [fol. 1083] The Carnation Company pays the warehousing and the buyer would go to the warehouse and pick up the merchandise.

Q. Still looking at this same particular invoice, Mr. Murphy—I don't mean invoice—price list, this states that it's a price list for Zone 2 and then shows the states which were in Zone 2 on the date of this particular price list which is January 5, 1959. Now, my question to you, Mr. Murphy, is do you sell all over Zone 2 at the same price?

A. No.

Q. Why not?

A. Well, because of the competitive situation in each market. Zone 2, for example, covers a wide area and we would have a different competitive situation in each and every market. And the result is that we would have some type of a program that would reduce our price in those markets, in some markets to a greater degree than others because of competitive situation in the market.

Q. Now, you've used the word "program." Is that the same as a deal as has been used by other witnesses during the course of this—

A. Yes, sir.

Q. A special promotional offer, is that correct, sir?

A. Right. Ours are all short term, what we call short term deals.

Q. Now, would you expect different types and amounts of deals in different markets at the same time?

A. Would you state that again?

Q. Would you expect different types and amounts of deals in different markets at the same time?

A. Yes, that's continually going on.

Q. And why is that, sir?

A. Well, because in one market you've got one competitive situation and in another market you've got another competitive situation and they're all different. And trying to remain competitive to a great degree, we have to have a different type deal in each and every market that we're in. Now, sometimes we have the same deal in two or three markets, but many times it's different in every market that we're in.

Q. All right, sir. I call your attention, Mr. Murphy, to Defendant's Exhibit M-18 which is the price chart for Salt Lake City apple pie during the year 1960, and I particularly call your attention to this break in the Carnation line here in February of 1960 down to this point and then back up to what is it, $3.60 in the early part of March, 1960. Do you remember that particular situation?

A. Yes. That was a short term program that we used in the market.

Q. Would you describe the particular program you had?

[fol. 1084] A. Yes. We termed it an introductory offer. We used it in a number of markets. We used it in Salt Lake. We used it in Kansas City, Oklahoma City, Dallas, Houston. I think we used it in Portland. We used it in a number of markets and we termed it an introductory offer. In other words, in these markets that I specified, and there could be other ones, our market position was very weak and we developed a special pack with a bulls eye on it that indicated to the consumer that she was getting a pie at a special introductory price, five cents off per pie.

Our pies are packed six to a case, which meant that the price was thirty cents off. In addition to that, we offered to the grocers fifteen cents a case advertising allowance over and above our regular co-op, which at that time was, I think, it was five cents a case at that time which since has been discontinued.

Now, in that particular offer, and we did this in all the markets that we had this special pack, we went into the

market with a certain allocation of merchandise. It was a short term deal and it was strictly on an allocation basis. Actually, if any account in the territory did not pick up their allocation, it was to be withdrawn from the market because it was a limited sale for a limited time only. I forget the period of time that it was in effect here, but it couldn't possibly have been over a six week period. It could have been shorter if everybody picked up their merchandise in a shorter period of time.

Q. Was the nature of this particular deal or program, this special pack, announced to the trade in the Salt Lake area when you put it into effect?

A. Yes, sir.

Q. Now, Mr. Murphy, in working out these deals or programs that you have for marketing your frozen pies, do you meet with the frozen food committee of the Carnation Company?

A. Yes, sir.

Q. Now, what is the frozen food committee?

A. Well, the frozen food committee is a committee of top people in the Carnation Company, and we present our recommendation to this committee and they either accept it, reject it, or ask us to take another look at it.

Q. Now, in these meetings, do you discuss whether to meet other competitor's deals and programs as they come along?

A. Well, just about every program that we bring it is to meet somebody someplace, and competition certainly is discussed at the time that we present our program.

Q. Do you meet each competitor's deal that may come along?

A. No, sir.

Q. And why not?

[fol. 1085] A. Well, you've got certain—well, there's certain conditions in a market that kind of guide you as to whether or not you're going to meet the conditions in the market, and we base our recommendation on that particular phase of our operation.

Q. Now, in working out these deals or programs for one particular market, do you raise prices in one market to compensate for decreases in another market?

A. No, sir.

Q. Now, in setting up these deals or programs, do you offer the same deal to all the customers in that particular market?

A. Oh, yes. If we come into ex-market we would offer the same type deal to every customer in the market without exception.

Q. Mr. Murphy, I show you what have been marked for identification as Defendant's Exhibits C-W and C-X and ask you what these are?

A. Well, these are—well, C-W first is a Simple Simon green apple pie package.

Q. For what size?

A. This is an 8-inch, 24-ounce fruit pie. This is a Simple Simon 9-inch, 34-ounce green apple pie. This is our deluxe 9-inch fruit pie.

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(The exhibits marked Defendant's Exhibit C-W and C-X for identification were received in evidence.)

By Mr. Billings:

Q. Have you had any success with these 9-inch pies in the Salt Lake market, Mr. Murphy?

A. No, no success whatsoever.

Q. Why is that?

A. Well, because of the low prices of 8-inch fruit pies.

Q. Well, would you explain that?

A. Well, the 9-inch fruit pie is priced significantly higher than the 8-inch fruit pie. It's a heavier pie. There's 34-ounces in the pie and obviously it has to retail at essentially more money. And with the low price on pies in a market such as Salt Lake City, there's too wide a spread, and it's kind of a shock to the homemakers, and

the result is it's very difficult to get your premium line off the ground.

Q. Mr. Murphy, are you familiar with the market situation in Denver, Colorado?

A. Fairly well, yes.

[fol. 1086] Q. What is the Carnation market situation in Denver with respect to its 8-inch frozen fruit pie?

A. We have a very limited business in Denver. Actually we're almost out of the market in Denver.

Q. In that connection, have you had a general price decline in 8-inch frozen fruit pies throughout the entire United States as far as Carnation is concerned, Mr. Murphy?

A. Over a period of years the price has gradually worked itself down quite substantially.

Q. And what facts have you observed in connection with this decline?

A. Well, the reason for the decline, in my opinion—actually, there's a number of reasons. One of the reasons is that today you've got private label merchandise to be concerned with, that some of the chains have taken on private labels, some of the distributors have taken on private label. Also, we're now faced with light weight pies, 20 and 22-ounce pies that are sold under the price of Simple Simon pies, all of which add up to a competitive situation that makes it more difficult for a quality pie such as we pride ourselves in.

By Mr. Billings:

Q. Do you know of your own knowledge, Mr. Murphy, how many advertising allowance programs you've had in the Salt Lake market area in the four years 1958 through 1961?

A. Well, there would be very few of them. The only one that really comes to my mind is the one that I spoke about in conjunction with that special pack merchandise that

we have in here. Our programs in Salt Lake City have been off the face of the invoice to bring pies to the—bring the price of our pies down so that we could be more competitive and they would go to the consumer at a more reasonable price. And, as you know, in the State of Utah there is a state law here, as I understand it, that you have to get six per cent over cost. And that's the reason we've gone off the face route in Utah.

Q. Would you say then that advertising deals or programs in Utah are very infrequent?

A. Yes. I'm sure you would count them on one hand over the years.

[fol. 1087] Cross examination.

By Mr. Alioto:

Q. Mr. Murphy, there are just two subjects I want to talk about. First of all, that price zone. Your price zones, did you prepare this map, Mr. Murphy, or was it prepared under your supervision?

A. No, I had nothing to do with it.

Q. You had nothing to do with it?

A. Not preparing it.

Q. Well, here's my problem with your testimony. Your testimony is that these are the way the zones have been all through '58, '59, '60 and '61, is that it?

A. No. Originally we started out with Zone 1, and Zone 1, if my memory is correct—if you've got a price list I can follow it through for you, Mr. Alioto.

Q. Well, Zone 2 is the only one I'm interested in and the price list that confuses me is the price list, for example, dated October 19, 1959. And you will note that Zone 2, just Zone 2, no 2 a's, 2 b's or otherwise, Zone 2 includes Oregon, Washington, New Mexico, Idaho, Utah, Wyoming, El Paso—

A. Montana and western Nebraska.

Q. Montana and western Nebraska without any breakup as between 2 and 2-B?

A. That's correct.

Q. Therefore, my question is as of what time does this map speak or do you know?

A. If I get through with these price sheets it will bring it out on your price sheets because as we changed our price and broke up zones because of competitive situations, we would then put out a price list when we broke up the zone. In other words, we would have a price list for Zone 2. We would have a price list for Zone 2-B at that time or 1-A or whatever it would be.

Q. Well, then, what you're telling me is that without going through all of the price lists, you yourself don't know as of what date this map is supposed to speak?

A. No, I couldn't tell you that.

Q. Well, I guess we can make a comparison ourselves then, but I understood counsel's statement to be, was that it was from 1958 forward.

Now, this frozen food committee that's been talked about, in this committee you have sat there, have you not, Mr. Murphy, when you actually budgeted losses for the Salt Lake City area?

A. No, sir.

Q. Did you have anything to do with that?

A. No, sir.

Q. Well, who did?

A. Well, our accounting department handled the figures. My responsibility is with developing cases as far as marketing is concerned. As far as cost figures, why, that's not part of my responsibility.

[fol. 1088] Q. Well, in forecasting losses for a particular area, isn't it quite plain, Mr. Murphy, that you also have to forecast the selling price, isn't that quite clear?

A. Well, of course, I did not forecast that, Mr. Alioto.

Q. I understand that, but in your frozen food committee when you were fixing prices or making deals or setting up marketing programs as you've called them, weren't you aware of the fact that somebody in your organization was actually budgeting losses for the Salt Lake area?

A. No. All I deal with is cases when I present a program.

Q. Who has the responsibility in your organization for approving programs which involved within themselves the selling at a loss?

A. Well, that would be the frozen food committee. They would have the complete story and what our profits were or our losses, and it's not my responsibility. All I would go into—

Q. Aren't you on this frozen food committee?

A. No. Oh, no.

Q. I'm sorry.

Mr. Billings: I asked him if he met with them.

By Mr. Alioto:

Q. I thought Mr. Billings asked you some questions about it.

A. No.

Q. Well, do you meet with them?

A. I'm presenting programs for any given period, but I am not a member of the committee, and the only thing I sit on is a marketing program in recommending programs for markets throughout the area we operate in.

Q. Well, during this period of time were you oblivious to the fact that your frozen food committee was actually budgeting losses in connection with your sales in Salt Lake City?

A. Well, I'm not acquainted with that, Mr. Alioto, because I have no idea of it.

Q. Then the answer is that you were oblivious to that fact, isn't it?

A. That's correct.

Q. Okay. Now, in connection with these deals, do you recall a deal for the Seattle area which involved your paying the retailer or paying the wholesaler, rather, a thousand dollar check on the side for a full truck of your products, your frozen pie?

A. Well, I—I don't like the terminology. It's another

way of giving a man a 33⅓ cents a case for a promotional allowance.

Q. Well, let me just show you this document of April 13 relating to the Seattle area on 8-inch fruit programs. Do you remember the thousand dollar payment for full truck?

A. Yes.

[fol. 1089] Q. On a combining 8-inch and 9-inch creams?

A. Yes, sir.

Mr. Alioto: We'll offer this in evidence, if your Honor please, as Plaintiff's Exhibit next in order.

Mr. Billings: May I see that?

Mr. Alioto: Surely.

By Mr. Alioto:

Q. Now, the way this thousand dollar worked, if I'm correct in this, Mr. Murphy, is that the man just bought a full truck, he paid his invoice costs and then you folks sent him back a check for a thousand dollars?

A. That's correct.

Q. So it wouldn't appear on the invoice itself?

A. I'm not sure whether that come off the invoice or not. If you let me refer to the paper on it I could tell you better.

Q. I would be very happy to, sir.

A. We have some programs that are off the invoice and some are billed back.

Q. You will notice "paid by separate check from Los Angeles."

A. In that case it would be paid by separate check.

Q. So the way it worked out, after the man bought his truckload he paid his invoice price and you folks then sent him a check, a separate check for a thousand dollars a truck?

A. Correct.

Q. Now, the marketing programs, as you've called them, that you've had in Salt Lake City, you've termed one in 1960 an introductory arrangement. What were your marketing programs in 1961 with particular reference to that

period of time from January of '61 to June of '61 when Morton came out with this rather low price, do you recall that?

A. What were our programs or what did we call them?

Q. What types of programs did you have during that period of time?

A. We had an off the face invoice program. Generally—I'll make that general because there was very few times that we had an advertising allowance in Utah.

Q. And were any of those so-called introductory programs?

A. No.

Q. They were programs, I take it, to secure a greater share of the distribution in the area?

A. Well, I would say, yes. With our business here, anything we did would improve it.

Mr. Alioto: We have no further questions, if your Honor please.

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[fol. 1090] MELBOURNE E. WRIGHT, called as a witness on behalf of Defendant Carnation, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billings:

Q. Will you state your name, please, sir?

A. My name is Melbourne E. Wright.

Q. Where do you reside, Mr. Wright?

A. I reside at 1134 Princeton Avenue, Salt Lake City.

Q. And you are employed by the Carnation Company?

A. Yes, sir. I am district manager.

Q. And in 1961 was frozen pies under your supervision as district manager?

A. Yes, sir, they were for the first time.

Q. Now, was it a part of your duties during 1961, in

connection with fruit pies, to get information with respect to what your competitors were doing in this market?

A. Will you say that again?

Q. I said, was it part of your job as district manager with respect to frozen fruit pies to get information as to what your competitors were doing in this market?

A. Yes, sir, it was. It was part of my job to get competitive information on all products, including pies.

Q. Where did you get that information?

A. We secure our information from our trade contacts, the distributors, through grocery stores. I have a flow of information coming in to me from various parts of our territory, from our salesmen who contact distributors and jobbers in the area.

Q. And what do you do with the information after you get it?

A. Periodically I make reports to the Los Angeles Sales Department.

Q. Now, Mr. Wright, I will show you what has been introduced in evidence here as Plaintiff's Exhibit 58 and ask if that is a copy of a letter which you wrote?

A. Yes, sir, this is. It is a competitive report.

Q. And I notice it is addressed to Don West. Who is Don West?

[fol. 1091] A. Mr. West is Western Divisional Sales Manager.

Q. For the Carnation Company?

A. For the Carnation Company.

Q. Now, I notice the first part of this letter refers to Pet-Ritz pumpkin and mince and Swiss Miss pumpkin and mince and shows their prices in the various brackets. Where did you get that information, Mr. Wright?

A. This information here, this particular source of information, was from Associated Frozen Foods Department, from the buyer.

Q. That is one of your customers?

A. Right, sir.

Q. I notice in this you have a postscript on here which says "Pet-Ritz, Swiss Miss Pricing Information Received from Pet Headquarters." What did you mean by that, Mr. Wright?

A. At this particular time I was quite aware of a directive that was received in my office addressed to all district sales managers to the effect that we should make every effort to qualify any competitive information we send in, and particularly mindful of that I saw fit to qualify this information by stating a postscript. Did you wish me to read it, sir?

Q. No. What does it mean?

A. This information, in my way of thinking and in my judgment on the basis of the fact that it was taken from a pricing bulletin, which was headed "Local Pet Milk Company," qualified in my mind that it was authoritative, the fact that it had originated from Pet Milk Company.

Q. And you got this pricing bulletin from Associated Food Stores, you say?

A. Yes, sir.

Mr. Billings: That is all.

Cross examination.

By Mr. Alioto:

Q. What was the name of the gentleman representing Pet in this area at the time, Mr. Wright?

A. Mr. Daryl Nord, I believe.

Q. Mr. Nord, who testified here?

A. I don't know whether he did or not, sir. I doubt if he did. I have been here every day but one. He may have the day I wasn't here.

Q. He has testified here. Did you know him in 1961, in September of 1961?

A. No, sir, I didn't know him in a sense of having met him personally. I had never met him.

Q. You knew who he was?

A. I had heard his name referred to, yes, sir.

[fol. 1092] Q. "Pet Headquarters." You have this capitalized, "Pet Headquarters," in the postscript, you will notice, "Pet Headquarters."

A. Yes, sir.

Q. Do you know where Mr. Nord officed in Salt Lake City at the time?

A. No, I didn't exactly know his address.

Q. You mean you had no conception at all where Mr. Nord was in town, didn't know where the office of the Pet Milk Company was, your competitor, as you called him, you didn't know where his office was in Salt Lake City?

A. No, sir, I could not tell you that.

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DONALD G. WEST, called as a witness on behalf of the Defendant Carnation, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billings:

Q. Will you state your name, please?

A. Donald G. West.

Q. And where do you live, Mr. West?

A. Los Angeles.

Q. Are you employed by the Carnation Company?

A. Yes, I am.

Q. What is your job with the Carnation Company?

A. I am Western Division Sales Manager for Carnation Company, headquartered in Los Angeles.

Q. And looking at that map at your right there, Mr. West, could you point out to the Court and the jury the general boundaries of your Western Division?

A. Well, the Western Division covers about an 8½ state area. Could I stand up and just trace it?

Q. Surely. Here is a pointer, if you want it.

A. Covers the State of Alaska, which, of course, is not on here, plus this area through Montana (indicating).

The reason for this line right down here is that this is the boundary of my territory. In other words, I cover half of Wyoming, I cover half of Colorado. On this side of this red line is the responsibility of the sales manager.

I come down and I have two counties of New Mexico, State of Utah, Nevada, and during a portion of the time of this trial I had the State of Arizona. I currently do not. Of course, all of California. So actually I have about eight states or eight and a half states, plus Alaska and about half of California.

[fol. 1093] Q. Would you describe, in the portion which is on the map there, Mr. West, the particular market areas in your sales district?

A. We have six district offices in the West. We have a Los Angeles district with an office in Los Angeles. We have the San Francisco district headquarters, which is the San Francisco district, Northern California, as you can see —Northern California and part of Nevada. And by the way, the Los Angeles district covers all of Southern California.

We have a district in Portland, Oregon, which covers Oregon and in through Boise, Idaho. We have a district office in Seattle, Washington, which covers eastern—which covers western Washington.

We have a district office in Spokane, which covers eastern Washington and the State of Montana, and we have a district office in Salt Lake City, which covers the State of Utah, part of Nevada, part of Colorado over through Grand Junction, the Western slope, and part of Wyoming, and a couple of counties in New Mexico.

So, basically, we have six district offices. These six offices are headed up, as this one you just met the last witness, who is district manager for Salt Lake City. We have five others like him, plus 150 salesmen under this responsibility in the Western Division.

Q. Now, do you, as part of your job as sales manager, visit each of these marketing areas from time to time?

A. I visit them quite frequently, Mr. Billings.

Q. And do you also get information about the competitive situation in these markets from your managers?

A. I get as much information as I possibly can from my managers. It is the responsibility of a district manager to keep himself thoroughly informed as to what is going on within his marketing area. It is his further responsibility to keep me thoroughly advised as to what is going on within his marketing area. If we don't—this is my only source really of information. With 150 men in the area which we encompass in the Western Division, the only possible way that we can know what is going on in all these various and sundry marketing areas is to have the people within that area keep their ears to the ground, know what is going on within their marketing area, analyze the facts, and, as the comment was brought out, referring to the last bulletin, I sent the bulletin out during this period of 1959-1960 throughout the whole Western Division. We were getting too many rumors and not enough facts as to what was going on competitively. We don't want the rumors. I don't want to hear the rumors. We want the facts. So it is their responsibility to keep me thoroughly advised, and this the only way I can get my information.

[fol. 1094] Q. I will show you, Mr. West, what have been marked for identification as Defendant's Exhibit C-Y, a number of documents. I wonder if you would just describe what these documents are. Don't say what is in them, but just describe generally what these are.

A. Well, these are competitive reports that are sent in periodically from the field, from these six district offices. They are sent in periodically telling me in essence what is going on within the marketing area, how do we stand, what is competition doing. That is all they are.

Q. Are these sent in by your managers in the ordinary course of business?

A. Yes, sir. Not only on frozen foods, but on all items. We have 164 items and sizes that we sell in this division, and they are sent in on them all.

Mr. Billings: I will offer what has been identified as Exhibit C-Y, a group of biweekly competitive weekly reports.

Mr. Alioto: From Mr. West to his own folks?

Mr. Billings: They are from his own folks to Mr. West.

Mr. Alioto: We will object, if your Honor please, on the ground that these are self-serving declarations with respect to competitive situations, and your Honor recalls the authorities we cited the other day.

The Court: The same ruling as I made the other day. Objection sustained.

By Mr. Billings:

Q. Now, Mr. West, I will show you what have been marked for identification as Defendant's Exhibits C-Z, C-A-1, C-A-2, and C-A-3, and ask you again if you will merely identify what these are and the dates on them?

A. Each one individually?

Q. No. Individually or—you have to do them individually.

A. C-Z is a photostat of a telegram from Mr. Wright to me regarding a competitive action.

Q. All right.

A. Dated—where is the date?

Q. I don't believe there is a date on it.

A. I don't believe there is one. C-A-2, a photostat of a handwritten note which I wrote to Mel Wright, dated—once again—here it is. Received September 18, I believe it is.

C-A-2, I guess—C-A-2 is a letter, photostat of a letter to me from Mel Wright regarding another competitive situation, regarding competitive pricing.

[fol. 1095] Q. Just show the date.

A. All right, September 22, 1961.

Q. And A-3?

A. A-3 is a photostat of a letter dated October 18, 1961 from Mel Wright to myself.

Mr. Billings: Now, your Honor, I offer these on the same grounds on which the others were also offered, plus the ground that these are part of the res gestae and explaining Exhibit 58, which is already in evidence and which was offered by the plaintiff.

Mr. Alioto: Same objection, if your Honor please.

The Court: Same ruling.

By Mr. Billings:

Q. Now, Mr. West, could you describe, from the standpoint of the Carnation Company, and with particularity with respect to frozen 8-inch fruit pies, each of these markets in this Western Division which are under your supervision. Describe the names of the competitors, the competitive conditions in the market, and so on, and do them, if you would, in the order of their importance to the Carnation Company.

A. Well, I will be as brief as I possibly can, because this is a long subject.

The Court: Well, now, before we embark on that long subject, wouldn't it be better for you to take it by question and answer instead of letting him give us a narration all over the Western Division?

Mr. Billings: Well, all right. I was trying to save time.

The Court: Well, I am talking about time. Let's get to the point.

By Mr. Billings:

Q. Mr. West, what is the most important market on 8-inch frozen fruit pies in the Western Division?

A. The most important market in the West is the

Southern California or Los Angeles district market, if only from the basis of population alone. There are nine million people there, and the potential is the greatest. It is our No. 1 market in the West.

The Court: I didn't remember he asked you about that. He just asked what was the most important market, and you said the Los Angeles market. So that answers the question.

[fol. 1096] By Mr. Billings:

Q. Who are your competitors in that market?

A. Our competitors in that market are Pet, Morton, County Fair, Johnston, Mary Elizabeth, ten or fifteen others. Our competitor is any pie that doesn't carry the Simple Simon label. It is as simple as that.

Q. Would it be possible in the Los Angeles market, for example, Mr. West, for you to sell Simple Simon pies at a price higher than your competitors are asking for their pies, Johnston, Mary Elizabeth, and so on?

A. It would be impossible, particularly in the pie business.

Q. Now, would you describe the next most important market?

A. The second most important market from the standpoint of Carnation Company would be the Northern California market, with headquarters—which would be our San Francisco district.

Q. Would you describe the competitors in that market?

The Court: Well, you don't mean "describe"; you mean name them.

By Mr. Billings:

Q. Name them.

A. The competitors in that market are also County Fair, Johnston, Morton, Pet-Ritz, Frigid Dough, Banquet, plus many others, too.

Q. Now, would you describe the competitive characteristics of the San Francisco market?

A. The San Francisco market is different than most any other market in the West. Its characteristics unique to that marketing area are that it is basically a 9-inch pie market. The 9-inch pie, as you have seen, is a bigger pie, a more deluxe pie, than the 8-inch pie.

In Northern California, although 8-inch pies are sold, our volume, our greatest volume, and the greatest percentage of the total pie volume done in Northern California, is done in a 9-inch pie market. This differentiates it from any other marketing area of that size in the West.

Q. What is the next most important market?

A. The third market would be—there is quite a drop-off from our potential or from our volume between those first two, to be frank with you. The third one would probably be Portland, the Portland district, covering the State of Oregon and Boise and points of Idaho.

Q. Would you name the competitors in that market.

A. We run into some regional competitors in that market along with our old ones, Pet, Morton, Swiss Miss; we have Chet, Bradley's, plus four or five other companies in the market.

Q. Would you be able to sell pies in Portland, Mr. West, 8-inch frozen fruit pies, at a higher price than your competitors are asking in that area?

A. This would be impossible.

[fol. 1097] Q. What is your next most important market?

A. The next one would be Spokane, the Spokane area. When I say that I am talking about our Spokane district, which covers, as I said, eastern Washington and the State of Montana.

Q. And would you describe the competitor—or identify the competitors in that market.

A. Pet, Pet-Ritz, Swiss Miss, Morton, run into Banquet, Frigid Dough, some Bradley, some Chet, and some four or five others. A lot of companies in this business.

Q. Would you describe the competitive conditions in the Spokane market as far as Carnation is concerned?

A. In what respect?

Q. Well, the same as you have for these other markets.

The Court: Well, why don't you ask him what you want?

By Mr. Billings:

Q. What is our relative competitive situation in the Spokane market?

A. Well, in Spokane—we have the same competitors as we have in other areas, plus a few more. I have just named them.

Q. Is that a price market?

A. Spokane is an 8-inch market, the same as Salt Lake City, Los Angeles, and all markets except Northern California.

Q. What is the next most important market?

A. I would have to say it is about a tie, because we don't have much in either one of them, and that would be Salt Lake City and Seattle.

Q. Would you take Seattle first, for example, and name the competitors you have in Seattle?

A. In Seattle we have Pet, Swiss Miss, Morton, Banquet, plus four or five other labels in Seattle. Actually, we are very—we are just about extinct in the Seattle district. This is the Seattle district which is western Washington.

Q. All right. Now, the Salt Lake market, who are your competitors in the Salt Lake market?

A. In the Salt Lake market our competitors are Pet-Ritz, Swiss Miss, Morton, Utah Pie Company, and four or five other brands.

Q. What is the nature of the Salt Lake market from a competitive standpoint?

A. The Salt Lake market is similar to many of the other markets in the West, in that it is an extremely price-conscious market. The reason for our not getting off the

ground with our 9-inch pies here: It is a price-cutting market, it is an aggressive price market. In my opinion, there is very little brand loyalty, and it is basically similar, Mr. Billings, to most of the other markets in the West, with maybe one exception, that there is an extremely strong regional competitor in here.

[fol. 1098] Q. Could you sell pies in Salt Lake City at any higher price than your competitors are asking?

A. We couldn't sell—no, to answer your question.

Q. Is there any relationship between the price in any one of these marketing areas at any given time and the price in another marketing area at the same time?

A. Not really. There is no relationship in price because your sales volume is dictated by competitive situations within any market. I know you have heard this. This is so true. We have to be competitive. We may have a price in Los Angeles that at times could be higher or lower than in Salt Lake City, depending upon competitive situations within any marketing area. It is a price market, the same as the rest. You have got to be competitive.

Q. I assume, Mr. West, you have been talking about the situation, in answering my questions, during the period 1958 to 1961 with respect to frozen fruit pies, is that correct?

A. Actually, I can only speak from June, 1959.

Q. I see. To what date?

A. Through June of 1962, let's say, through the end of the trial.

Q. Excuse me. Do you know whether any of your competitors in the Salt Lake market have permanent representatives in this market?

A. No, I don't know. I don't know any of our competitors. I don't know any of our competitors, to be frank with you. I was thinking I met Daryl Nord of Pet Milk at the airport twice in a four-year period. I didn't know Morton was represented here. I don't know the Utah Pie people. It is our responsibility and my people's responsibility not

to associate or know their competition personally—our competition. We don't know them. We don't associate with them. We may run into them in the trade, and this is it.

Mr. Billings: I have no further questions.

Cross examination.

By Mr. Alioto:

Q. Mr. West, just a few questions. Who is the man in the organization, in your organization, that has the ultimate responsibility for fixing the price at which pies ought to be marketed in the Salt Lake area?

A. I don't know.

Q. What did you say your title was?

A. I am sales manager for the West.

Q. Sales manager for the West.

A. That is correct.

Q. And you don't know who fixes your sales price in the West?

A. That is correct. Do you want me to explain that a little further for you?

[fol. 1099] Q. Say anything you want, sir. Certainly you might explain that.

A. Prices—our price lists, if that is what you are talking about, are channeled through to the sales department from the product department, and they are either decided in the product department or at some other level of the company. This is not my responsibility. The sales price lists come through the sales department, and we funnel them out to the field. So as far as who sets the price or who makes up the price lists, the ultimate responsibility, I don't have the slightest idea.

Q. Did you know, as a sales manager, that your sales in the Salt Lake area during most of this period of time were sales below cost?

A. I would have no idea. My responsibility is selling cases.

. . . . . .

Mr. Billings: Your Honor, with respect to the understanding that Mr. Alioto and I had last Friday, I'm not asking to read stipulation in the record. That if Miss Carol Pierson, an employee of the Carnation Company in Los Angeles were called she would testify that she was the secretary to Mr. D. W. Hogue, former manager of the Carnation Company Frozen Foods Division. She worked for Mr. Hogue from July 1956 until his death in the spring of 1962.

[fol. 1100] Commencing January, 1957 after each meeting of the frozen foods committee, which meetings Mr. Hogue regularly attended, he dictated to Miss Pierson, a summary of the events which occurred at the meeting. Miss Pierson typed mimeographed stencils of these meetings and circulated copies of the minutes to each member of the committee. Mr. Hogue kept a personal set of the minutes and Miss Pierson kept the master stencils.

When a new development occurred relating to a subject matter previously covered by the minutes, she would type this subsequent development on the master stencil and circulate the new page to committee members. The index numbers were assigned as new pages came up. The minutes were regularly dictated by Mr. Hogue and are now being dictated to Miss Pierson by the current manager.

Mr. Alioto: And what is his name?

Mr. Billings: Mr. Stewart. I think you took his deposition.

Mr. Alioto: I will stipulate, if your Honor please, that if Miss Carol Pierson were here she would testify as counsel has read the statement.

The Court: All right. Ladies and gentlemen, you are to receive that testimony as though the woman were here on the stand, sworn and cross-examined. They have agreed that this would be her testimony.

Mr. Billings: Thank you. Now, your Honor, based on that testimony, I would like to offer that portion of the minutes, and I have carefully culled from those minutes those which relate only to the matters which have been raised during the course of this case, and offer those as being under the business records rule.

Mr. Alioto: It's objected to, if your Honor please, on the grounds self serving declarations do not qualify under the Federal Business Records Rule at all as stated in the authorities previously cited.

The Court: The Federal Business Records Rule is an adaptation of the old shop book rule. I don't think it applies to this. Objection sustained.

[fol. 1101] Mr. Billings: May I have it marked for identification, your Honor, these minutes which I offered; the portion of them, and attach to them an index showing the subject matter so as to indicate that I relate to the very narrow field, so the record would show my offer related to an exhibit which has been identified as Defendant's Exhibit C-A-4.

The Court: All right. The objection is sustained. The exhibit is not received in evidence.

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S. Alfred Halgren, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Billings:

Q. Will you state your full name, please, sir?

A. S. Alfred Halgren.

Q. And where do you reside, Mr. Halgren?

A. I live in Los Angeles, California.

Q. And you are employed by the Carnation Company?

A. Yes, sir.

Q. What is your position, Mr. Halgren?

A. I'm a vice president and a director of the company.

Q. Are you also chairman of the frozen foods committee that we've referred to here?

A. Yes, sir.

Q. What is the function of that committee, Mr. Halgren?

A. Well, the committee was originally organized by our president as a management committee of the executive committee of the board. Now, to explain that just a little more fully. The executive committee meets weekly in Carnation Company, goes over budgets and the various matters of concern to us on all divisions. In order to cut down the time of the executive committee which is composed of six members, we set up for quite a number of our divisions what we call the divisional committees. And we always have on those committees either three or four members of the executive committee. And the manager of the division, while he is looked upon as a member of the committee, actually is not a member of the committee as it was originally proposed. But he is there all the time. Usually the vice president in charge of sales and advertising will sit in on all the meetings. The rest of the people, production people, merchandising people, sales people will come in as called with problems in their particular area. [fol. 1102] They do not make decisions. They make presentations. Now, the presentations that are made to the committee are ones that have been previously discussed and agreed upon by the manager. Now, the manager of the division in our particular organizational setup is like a president of a smaller company.

We look to him to make a profit in his division or he heads it and he's responsible for the profit and loss. When he needs a capital expenditure or a merchandising expenditure, an advertising expenditure, that has to be approved by the executive committee. He makes that presentation now under our organizational setup through this management committee that I'm speaking of, and then it's brought

up in executive committee with the approval of the management committee and it's automatically, just automatically goes through unless some other member of the executive committee has a question on it.

Q. All right, sir. Now, as chairman of the frozen foods committee, then, I take it, you have had a substantial responsibility with respect to the pricing and selling of frozen fruit pies by the Carnation Company?

A. Yes, counsel. Of course, I'm on other committees, too. What we do, we do make decisions on merchandising, on budgets, on various things that have been discussed here, yes.

Q. Have you personally, Mr. Halgren, in that capacity ever made any attempt to get the Bel Air contract for the Safeway people?

A. I sure have.

Q. Could you describe what those attempts were?

A. Well, back in about—I came on this committee as chairman in 1957, and shortly after I came on I went up to Safeway people and asked them for a chance to produce Bel Air pies. And, after some discussion they said we only have the one plant. They wanted a company with plants across the country and, therefore, we were not given any consideration, apparently.

Now, we have again tried in the last year or two we have had more capacity at our plant than we needed, and we've gone in and tried to get at least three times, within the last year and a half, a portion, at least, of the Safeway business, particularly in southern California.

Q. Were you successful in those attempts?

A. No, sir, we haven't been.

Q. Now, Mr. Halgren, there has been some testimony during the course of this trial with respect to an occasion in the summer of 1962 when some representative of the Morton Company called on you to discuss co-packing. Do you remember that occasion?

A. Yes.

[fol. 1103] Q. Would you describe that?

A. Well, our manager had a call from Mr. Vail, I think it was, in June of '62. It was shortly after they took my deposition on this case; maybe a month after. He wanted to see us and so he came into the office and we called in our committee because I had no wish to converse alone with Mr. Vail at all. I wanted the full committee there to hear what he had to offer.

Well, Mr. Vail came in with two propositions. Number one, he asked if we were interested in selling our plant to Morton. And number two, he asked if we were not agreeable to selling our plant or not interested, would we consider co-packing. And we told Mr. Vail that we didn't think we were interested in selling but we would give it some consideration; that as far as co-packing is concerned, that only to the extent that if he wanted to give us his formula of the kind of pies that he wanted us to produce, we would produce them and tell him what we would produce them for.

He suggested that they go in our plant and we said, no, we wouldn't permit him to go in our plant. If he wanted to give us the formulas, then we would give him a price. So that's about the end of that meeting. We hadn't definitely said we were not willing to talk of sale at that time. And when he left we discussed the whole matter and he called us back, oh, I think Mr. Vail was on a trip or something because it seems to me it was a week or two weeks or maybe three weeks later. I don't know how long the time element was.

Q. Would you speak up a little so the jury can hear you?

A. He called us back and wanted to know had we made a decision, and we said yes, we would not sell the plant to him, and were not interested in talking to him about it.

He said, "Would you consider co-packing for us?"

And he said, "We would consider co-packing a certain amount, whatever we felt we could put through our plant under the terms that we discussed with you, that is, your

submitting to us formulas for the pies that you wanted so we could cost them out and get a profit for ourselves."

We didn't hear anything more from him until a Mr. Kitchin—

Q. I think Kitchin is the name.

A. Is it Kitchin? Mr. Kitchin came in and he called our manager, Mr. Stuart, and said he wanted to meet him at the plant. And Mr. Stuart said, "I won't meet you at the plant. If you want to see me about anything, you come to the office."

[fol. 1104] So Mr. Kitchin appeared at the office, and he was escorted into my office with Mr. Stuart, who was present. We asked him what he wanted, and he said he wanted to discuss co-packing.

We said, "Well, what is there to discuss? What do you want us to co-pack"?

He said, "Well, we would like to go into your plant and redo it a bit, and we feel that we can help you on costs, and it will save us something and you something, and I would like to go down and inspect your plant with a view to this kind of an arrangement."

We said, "Mr. Kitchin, we are not at all interested in that. We told you we didn't want you in our plant, and, as far as we are concerned, we are definitely not interested."

And with that it ended and he left, and that is all we heard.

Q. Prior to these discussions with Mr. Vail and Mr. Kitchin in 1962, summer, had there been any earlier discussions with the Morton Company about co-packing?

A. Well, I don't know that you could call it a discussion. As a matter of fact, I had completely forgotten about it. Shortly after I came on this committee—

Q. That was in 1957?

A. That was in '57. I replaced Mr. Harold, a man who retired at that time. I was back in New York doing some other business at the time we had the frozen food dis-

tributors' meeting, and our boys were there, because we at that time, early in the game, we were selling a lot of our product, not direct to wholesale accounts, but through frozen food distributors. And we used to go to their conventions in order to try to get better distributors in areas that we were in.

So I went over to our booth. We had a display. And as I stood there George Vail and somebody else from Continental, and I think it was a man by the name of McNalley, from the Baking Company, came by, and Mr. Hogue, our manager, introduced me to him. I hadn't met him.

And McNalley said he had heard that we had looked at a plant in the Midwest someplace. Well, actually we had looked at a frozen food warehouse in Indiana.

[fol. 1105] He said, "I don't think you people ought to worry about buying a plant in the Midwest." He said, "If you want us to produce pies for you in the Midwest, we will, and by the same token we have no plant in the West, and we would like to have you co-pack for us."

I said, "Well, we wouldn't be interested, No. 1, because our plant out West, we have no additional capacity and we are not looking for any additional co-packing."

We had just at that time, if I remember correctly, finished a co-packing arrangement we had with Libby, McNeil and Libby. We had packed some of their label for them in our plant.

And I said we were not at the point of wanting anybody to co-pack for us in the Midwest; if we went into the Midwest we probably would look for our own plant, but I wasn't ready to talk about it, and we didn't talk about it.

I never did see any of the Morton people again, nor talked to them about it until Mr. Vail called to come in and see whether we either wanted to sell or co-pack.

Q. In other words, between 1957 and 1962 there were no discussions with respect to co-packing?

A. No, sir.

Q. Now, Mr. Halgren, when did Carnation Company get into the frozen pie business?

A. Well, we bought Mrs. Lee's pies in, I believe it was June of 1955.

Now, when we bought them, they had two little plants in Los Angeles, one they called the Santa Fe Plant and another they had purchased. They hadn't even gone in it yet. It was a building used by some other company during the war period, I think some drug outfit, that had originally put it up, and they were intending to move because their plant, the Santa Fe Plant, was a very small one, and their business was really too large for it.

So we acquired those two plants.

Well, our people have been in the milk business for years, and we were really—when our Board went down to look at what they had bought, they should have gone before because the conditions, as far as we were concerned, from a milk plant viewpoint, were just not sanitary, and our people were horrified.

[fol. 1106] So immediately we started to convert this Torrance plant, which was the drug company plant, to a frozen food plant. It was part of the deal. But it took us about a year to do it, actually, to put in the refrigeration and to put the tile work in and to finish it off. And we moved there as soon as we could.

Now, when we took over Mrs. Lee's pies, as usual you find that you don't know all of the story when you buy them, and we found that they were selling pies as far east as Miami, Florida, and apparently the man, Mr. Reid, would take a trip East and if he could sell some pies at a particular store, he would sell them, and he had dabs of pies all over, in Ohio, and in Atlanta, Georgia, in Miami. So it took, oh, I would guess a good year and a half or so to try to pull this thing a little closer to home and make some sense out of the business. It is a little different business and, frankly, we had to try to learn it. We felt we wanted to have some experience. We had been doing freeze drying in our laboratories, and we wanted some experience in the frozen food field. We are in the food

industry, and we felt that we needed some experience. And that is, frankly, why we bought this small company.

Q. Now, it has been pointed out that as you took over the Simple Simon label and developed it, you developed a zone system. Would you describe this zone system you have?

A. Well, as I say, when we bought this Mrs. Lee's pie, they had no printed price list. I don't even know, and, as a matter of fact, it took us about three months to try to find out whether their pricing was legal or not, because apparently they would offer a price to one man and go across the street to his competitor and offer another price to get the business. And we can't operate that way.

And we had to ferret out all of these things, and we tried to go and put our business on a business-like basis where our customers all—all customers of ours who were competitors would get our merchandise at the same price, as simply as that.

Now, we turned this matter over to the Legal Department, frankly, to try to design some sort of a basis for pricing that would fit in with our sales organization, that would make some sense to us so that we could print price lists and give them to the trade in each area that we were in.

And they worked on this thing from a standpoint of our various sales divisions from the standpoint of where we had distribution. If you will remember, I think—I don't know whether the records show up to this point or not, [fol. 1107] but we were in Salt Lake City—they were in Salt Lake City sometime before we bought them, and we took the places that they were selling pies, and we made the zone prices, trying to fit in with our sales organization so that we could print a price list that they would have. And we also, incidentally, and as good legal Departments will often do, tried to reflect the transportation charges and everything else, which is a fine thing. We came out with them, and about a month later they were no good

because, obviously, we found out that very soon that the pie business was a rapidly growing industry, with a lot of people coming into it, and we couldn't afford to sit still in a given market and sell your pies at five cents apiece, or ten cents apiece, above another good pies in the area, so you would have to meet your competition. And, frankly, we had to meet the competition. That meant we had to change the price lists.

And we tried to narrow these zones down and, frankly, I don't think it means too much any more, except it went into our sales offices usually that were located pretty much matching the zones, so that if we made a change down here, we didn't have to send it over the whole circuit. That is about what it amounted to.

Q. You also have delivered prices. Why do you have delivered prices, Mr. Halgren?

A. Well, there are really two reasons for delivered prices, the main reason being that we want all of our customers, that is, the Safeways and the AG's, and the customers who are competing, say, in the Salt Lake area, to get our merchandise at the same price.

It has been argued many times that you ought to have a price at your plant and let them pick up.

Well, that becomes very complicated. Some of the trade will have a truckline of their own, and they will come in and pick up and maybe with some other stuff, and many times we found them even drop shipping along the way to some other good friend, and there would be customers that were competing that got their merchandise at a different price either because they had a truckline or because they had a friend. And, frankly, we didn't have the space to have all these trucks back in and take deliveries in small amounts from us. Our dock was limited.

So we just said, "We will sell delivered price to you in the area, and it doesn't make any difference if you are over here, that is what it is delivered, and you could pick it up here, but you would pay the same price."

[fol. 1108] And we tried to discourage this picking up at our plant because, frankly, we just didn't have the space to take care of them.

Q. Now, Mr. Halgren, there has been some reference during the course of this trial to the budgets which are presented to the Frozen Foods Committee. Would you describe what these budgets are?

A. Well, the division has its own controller. I think he was on the stand here. And he sits down with the manager of the division, makes a forecast of the coming year. He may make it for five years, but always for a year, and he goes on, frankly, on the experience of the past year. How much sales did we have last year? How much are we going to have next year? And it is purely a guess. And then based on, for instance, our costs of merchandising last year, our cost of our fruit, they estimate what the profit and loss is going to be. It is a forecast. You might call it a guess.

Accounting is not an exact science. Many companies allocate costs entirely differently. We try and make each of our units absorb overhead, of our experimental laboratory, our various staff departments, and you can add or subtract. I have seen lots of figures. As I say, accounting is not an exact science. And we try to put it in there and take a look at it each year. And we revise it quarterly usually as we go along, because your actual experience will tell you what is happening.

Q. Some of those budgets, Mr. Halgren, show that the Accounting Department has predicted losses in connection with the sale of frozen pies. Why would that be so?

A. Well, again, that is this—and I am not an accountant. I have taken some accounting. Predicting losses is, of course, a reflection of what you expect to do next year, based on what you did the year before, based on the costs of producing the pie, based on the expenses of your company, and the portion that you are going to allocate to this particular division.

And then you say, "Well, we guess we are going to sell this blank number of cases the coming year, and based on that, based on what we did before in the way of merchandising costs, we are either going to have a profit or a loss net."

And it is a guide line. It shows us what direction we are going in our business.

Q. Do you budget losses for the purpose of destroying a competitor?

A. No, sir. I should say not. As a matter of fact, we have found over the years that competition makes business grow usually, and I don't think, in my memory with the company, we have ever gone out to destroy any competitor. I think when you try to destroy somebody else, you destroy yourself. No, sir, we didn't.

[fol. 1109] Q. Talking about losses, Mr. Halgren, I show you here one of the sheets from Plaintiff's Exhibit 22, which is already in evidence, which is the territorial profit and loss statement for the Carnation Company Frozen Foods Division. This one happens to be—the sheet I have in my hand happens to be for 1961. Let's get year to date, 1961.

This shows, does it not, Mr. Halgren, that you lost money in the Southern California division?

A. Yes.

Q. And you lost money in the Pacific Northwest—Mountain States division; and you lost money in the southwestern division?

A. Yes.

Q. The south central division?

A. Yes.

Q. The west central division?

A. Yes.

Q. And you have an over-all loss for 1961 in the sale of frozen pies. It shows you made a profit in the Northern California division. Explain why you had a profit?

A. Of course, again it comes to a little bit of your make-

up of sales. In Northern California—well, I probably should go back. When we took over this business in California proper, both northern and southern, we had what we call a wagon delivery business. In other words, they had trucks, and they would deliver directly to the stores. It looked like—and which later proved to be true that this type of business went out the window. Most of the major accounts, the chains, bought their own frozen food warehouses and wanted delivery to the stores. They didn't want a truck man delivering in there. So we discontinued very quickly our truck business in Southern California.

We didn't plan very well, and our truck business was a large part of the 9-inch business because that was our deluxe pie. We lost a lot of business when we cut down that truck delivery business in Southern California. So later on, about four or five months, when we shut it down in Northern California, we had all the distributors ready to take over the delivery to the stores so that none of the stores that were buying our product were out at all. They had a man there the next day.

As a result of that we have kept our franchise very well in Northern California on 9-inch pies, and it is a profitable item.

So Northern California, again, has been a very good market for us. We have had a high percentage of 9-inch sales and cream sales, which is a profitable item, and that is what makes the difference on this.

[fol. 1110] Q. Now, Mr. Halgren, if you are making money in Northern California because you are selling primarily 9-inch pies, and everywhere else you are losing money because you are selling 8-inch pies, why are you still in the 8-inch pie business?

A. Well, that is a good question. I will try to answer it for you. When we took this business over, Mrs. Lee's pies were selling, if I remember correctly, 9-inch pies, 7-inch pies, and then a 10½ ounce. It was a small pie made for two people. And then a small, about a 6-ounce pie for

an individual. I think Swanson sold that type of pie for a long time.

After we had taken over Mrs. Lee's pies, within about, well, I think in 1956, a lot of competition started in the business, and they started selling an 8-inch pie, 24 ounces.

Well, an 8-inch pie—the 8 inches is the width of the pan, the diameter. We had a deep 7-inch, but it didn't look big in the case beside the 8-inch, and for that portion of our business we just saw it going out the window, so we had to get over from the 7 inch to the 8 inch.

Well, now, what has happened in this business, regrettably as far as I am concerned—and that is where the Morton people and the Pet people and we part violently—we would not reduce the quality of our 8-inch pie. We felt that 24 ounces was right, that it was a better pie, that it gave more to the customer, and we were not going to deteriorate the quality of it in order to try to get business.

Unfortunately, in the pie business Mrs. Consumer goes into the market and she buys one pie or two pies, and she will usually buy the same brand if she wants to put them in the refrigerator. She doesn't buy a Morton pie or a Swiss Miss Pie and a Simple Simon pie, take them home and bake them in the oven and then cut them at the same time and compare them. No housewife will do that.

So she has a dessert. He has eaten. And it is pretty hard for her to tell—she looks at 22 ounces. Now, there are lots of ways of making 22-ounce pies. You might take out four ounces of fruit and put another couple of ounces of crust in them. So that you can do lots of things with pies and weight alone doesn't make all the difference.

But usually when you find cutting down in ounces of pies you find cutting down in fruit, and many times quality of fruit, and it becomes very difficult. We have tried to maintain our quality line of 24 ounces for an 8-inch and 34 apples, for example, for a 9-inch.

[fol. 1111] You have a plant over here that you keep running. You have employees in the plant that you want to

keep employed, and you don't want—now, we could have gone the route of cutting, yes, and we decided not to. We would rather use our research facilities. We have done that. We have been researching for two years on other products, completely out of the pie business, frankly. We have tried to cut our costs in the plant by putting in more mechancial equipment.

And you asked me why we are still in the 8-inch business. Because we started in it and we are trying to maintain some business until we can come out with a new item.

Now, for instance, the cream pie business was a development of ours. Our laboratory developed cream pies.

The Court: Well, now, just what has all this got to do with the lawsuit?

Mr. Billings: Well, your Honor—

The Court: Don't be telling me. Just suppose we proceed.

Mr. Billings: I think that is all the questions I have.

Cross examination.

By Mr. Alioto:

Q. Mr. Halgren, you're an attorney at law, aren't you?

A. Yes.

Q. A member of the California Bar?

A. That's correct.

Q. Who has the ultimate pricing responsibilities so far as the Salt Lake market is concerned, Mr. Halgren, on pies?

A. Our committee.

Q. The committee of which you are the chairman?

A. That's right.

Q. I take it during the period of time four years preceding the filing of this complaint, that you were aware of the fact that your company was budgeting or forecasting that you were going to sell pies in the Salt Lake area at a loss?

A. Mr. Alioto, I don't quite agree with you on the statement "at a loss." It depends on how you—what's your accounting. As far as our costs of manufacturing the pies, transportation, sales cost, we didn't lose any money. Now, if you want to take our overhead that we have in the company, yes, we had a loss and it would show on our sheet as a loss.

[fol. 1112] Q. That's right. In other words, your own internal records, records you prepare for your own purpose and records that were not meant to be displayed in a courtroom, for example, those internal records set that up as a loss?

A. That's correct.

Q. And I take it you weren't trying to kid yourselves at this point, were you, Mr. Halgren?

A. Mr. Alioto, we show this to our manager. We go over it with him. We expect every division to ultimately make a profit on that kind of a basis because we want them to support the over-all corporate entity just as much as anybody else.

Q. I take it you recognize that this loss you were selling at was partly absorbed by profits made elsewhere, that is, real profits after all allocations?

A. No, sir.

Q. You don't think so.

A. No, sir.

Q. Well, you don't recognize it. Suppose you were selling, suppose you were in the frozen pie business and selling just in the Salt Lake area and you made these gross profits without allocating your overhead and that's the only business you did. It's obvious that you'd go bankrupt, isn't it?

A. On the basis of the actual costs of producing these pies plus selling them plus freight, we weren't in a loss position, Mr. Alioto.

Q. I'm not talking about that. If you were selling on that basis in the Salt Lake area and you were a manufacturer in the Salt Lake area and all you manufactured were

the frozen pies which you sold, on that basis you would go broke, wouldn't you?

A. I doubt it.

Q. What did you say?

A. I doubt it.

Q. You doubt it?

A. That's right, because the costs—

Q. Who would pay for your overhead in that situation?

A. The overhead—the overhead of the plant itself is figured in that, Mr. Alioto, not the president, not the general counsel, not the research staff that we have, certainly. Those things, yes, we allocate by cases. Now, a case—and we do it just for the convenience of figuring. A case of pies against a case of evaporated milk against a case of something else by units. And it's an arbitrary way of doing it. We look at it from that standpoint because we say, well, this is what the other division is doing. Now, you make this standard because this represents the kind of return we think you ought to make.

Q. Mr. Halgren, let me get at it in this fashion. If all of the products you manufactured in the entire Carnation Company and its subsidiaries were sold on the basis of just this gross profit you have been speaking about, the company, would go broke, wouldn't it?

[fol. 1113] A. Well, we couldn't support the—we couldn't support all of the staff and all of the research we have, no, you are right.

Q. Obviously. Therefore, if you are using that kind of competition in an area where there is an independent who is only engaged in the pie business, who doesn't have any other businesses, who doesn't have any other divisions, who doesn't have any flour division, who doesn't have these other things, if that independent were compelled to sell on the same basis that you were selling your pies, the independent would be injured, wouldn't he?

A. I don't know what you mean by independent, Mr. Alioto.

Q. Somebody like the Utah Pie Company, that's just in the pie business and has no other way to make up losses.

A. Well, they are in the hot pie business and the frozen pie both, are they not?

Q. Yes, that's right.

A. So you see, in a sense, this pie division is an independent, too. We have one plant. We look at the profit and loss. Sure, they couldn't support our research staff, I'm sure of that. But it's really a method of allocation of overhead and, sure, your company gets larger; you do more things.

Q. Mr. Halgren, I want to talk to you about these co-packing arrangements. I take it that there was some discussion in your committee in June of 1957 about whether or not you should make these co-packing arrangements with the Morton Company?

A. No discussion. A report only that they had made the offer. That's all.

Q. Well, you mean that you rejected the offer at the booth before you went to your committee meeting?

A. That's correct.

Q. Didn't your committee have to act on it, Mr. Halgren?

A. Not on that. I was chairman of the committee, Mr. Alioto. I could make that decision myself.

Q. Well, your minutes read as follows: "Halgren explained that Morton had suggested a mutual co-packing arrangement so that we would co-pack pies for Morton at our Torrance plant and Morton would co-pack for us in their Webster City, Iowa, plant. It was explained that in figuring the total production capacity at Torrance that we did not have production time for Morton and, further, the arrangement would not be satisfactory. It was agreed that we would not get into such an arrangement with Morton."

Now, I take it that means that the committee agreed upon it.

A. Well, we told them about it but I had turned them down. We never discussed it with Morton. I knew that.

Q. How did the Morton Company know that you were trying to get a plant back in the middle West somewhere?

A. Well, news gets around. There were a lot of people looking at that plant.

[fol. 1114] Q. And they told you about it; they understood you were getting that plant, is that correct?

A. Well, they understood that we were trying to buy a plant.

Q. And this was told to you by Mr. Vail?

A. No, I think it was—this fellow, another man from Continental was with Vail.

Q. Was Vail with him at the time?

A. Well, I don't know. You see, that's '57, and I know it was discussed with one of them. He just called me over to the side of the booth.

Q. And it was the same Mr. Vail who discussed this same thing with you in 1962, as you testified, is that correct?

A. Well, this was a little different in 1962. Mr. Vail, number one, wanted to buy our plant. And number two, he wanted sort of a joint venture, as far as I can figure out, where they would come in and help operate our plant, and we were just not interested.

Q. Mr. Vail proposed a joint venture to you?

A. Well, I couldn't quite understand Mr. Vail's proposal, frankly, because he wanted to go in our plant and put some of their equipment in it.

Q. And this was—and how long did that discussion take between you and Mr. Vail?

A. It took about ten or fifteen minutes. Mr. Gormley was there. The whole committee was there.

Q. Then the committee discussed it after Mr. Vail left, did it?

A. And decided we wouldn't do it.

Q. Well, you didn't give him an answer right at that first discussion, did you?

A. No. Actually, we told him we were not interested in

having him in our plant but we would take under consideration the offer to buy our plant.

Q. When he called up two weeks later, didn't he ask what you were going to do about co-packing?

A. No. He asked us first about the plant. That's what he was interested in, and we said no, we weren't interested in selling it.

Q. At the time he discussed the matter with you and Mr. Gormley and your committee, didn't Mr. Vail of the Continental Baking Company give you both proposals, a proposal to buy your plant and a proposal to have what you have called a joint venture?

A. Well, he first asked us if we were interested in selling.

[fol. 1115] Q. Yes.

A. And we said, well, we don't know. We'll take it under advisement. We won't give you an answer. Now, he says, "If you're not interested in selling, we're interested in a co-packing arrangement."

Q. So that both proposals were discussed at that first session, that's correct, is it not?

A. That's correct.

Q. And no decision was made at that first session on either proposal?

A. Except this—

Q. Is that correct?

A. No, not quite correct.

Q. Okay, tell us.

A. I told Mr. Alioto at that meeting—excuse me.

Q. Mr. Vail is the one you told at that meeting.

A. I'm getting you two mixed up.

Q. I don't know whether that's a compliment or not. He hasn't come here so I don't know whether I'm being flattered.

A. Right. I told him we weren't interested in having him in our plant; that we might consider co-packing arrangement where they would give us proposed formulas for the pie they wanted us to bake. We would cost it out and tell them what we would produce it for.

Q. So at that first session then the idea really wasn't rejected, was it?

A. Well, the idea of this coming in and putting machinery was pretty well rejected, Mr. Alioto. The other idea of sale was not rejected. We hadn't talked it over. As a matter of fact, we took that to full executive committee.

Q. Well, let's stay with the co-packing because I'm not clear on this. Either the co-packing arrangement was rejected or it wasn't rejected at that first meeting at which Vail was present. Now, which is it, in the light of your testimony that somebody called up a couple of weeks later and inquired about it?

A. Well, now, Mr. Alioto, if you'll just back up for one moment. The co-packing arrangement we discussed on his part was some items that we didn't produce and weren't equipped to produce at the plant and we weren't interested. We told him that. On our part, it was fruit pies and only on the basis that he give us his formula.

Q. Therefore, the arrangement on co-packing as it related to fruit pies, was not rejected out of hand at that meeting?

A. No, I don't believe it was.

Q. Okay. So then you discussed, your committee in Mr. Vail's absence, I take it, discussed the pros and cons of either selling the plant to Continental or making a co-packing arrangement on fruit pies?

A. That's correct.

[fol. 1116] Q. When you said that Mr. Vail suggested he redo your plant, wanted to redo your plant is the language you used. Had he been in it before?

A. No.

Q. Well, how did he know anything about your plant then?

A. Well, he was proposing other products that were completely foreign to our operation.

Q. Now, at the time that you were deciding whether or

not you were going to make this deal with the Continental Baking Company in that interim before you announced a decision to Mr. Vail, did anybody in the company believe it should have been made?

A. What should have been made?

Q. The co-packing arrangement.

A. I don't think we discussed the co-packing arrangement at all because we had proposed to Mr. Vail a certain way that we might be interested, and that's all.

Q. At this time, Mr. Halgren, were you supplying Continental Baking with anything?

A. No, sir.

Q. Were you not supplying—you had no business relations with them at all?

A. None.

Q. Now, in 1957 were you a supplier of Continental Baking Company?

A. Not that I know of.

Q. In 1957 did you have any business relations at all with the Pet Company?

A. Well, in 1957—any business relations with the Pet Company?

Q. Yes.

A. Well, sure, Pet Company owns a percentage of General Milk Company, which is a joint venture, so to speak.

Q. This is a joint venture between the Pet Company and the Carnation Company, is that correct?

A. Well, under the Webb-Pomerine Act. It's a foreign operation and the Pet Company owns 35 per cent and we own 65 per cent, that's correct.

Q. Now, do the officials of the Pet Company meet in the headquarters of the Carnation Company in connection with the business of this Webb-Pomerine?

. . . . . .

[fol. 1117] Q. And these gentlemen met at the Carnation plant four or five times a year, do they?

A. They meet four times a year; they have four meetings of the board of directors of that company and they meet, yes, in our board room upstairs four times a year, right.

Q. Have you ever attended those meetings?

A. No, sir.

Q. Who are the representatives of the Carnation Company who attend those meetings with Mr. Gamble and Mr. Harter of the Pet Company?

A. Well, there's Mr. Gormley and Mr. Hartwick and Mr. Stewart. That's quite a business. It's a foreign business. It's a milk business, incidentally.

Q. Now, you folks split approximately a million dollars a year in dividends in connection with that company, don't you?

A. Pardon?

Q. You split approximately a million dollars a year in dividends, during this period?

A. Well, I can't tell you that. The dividends are obviously paid out according to the stock ownership which is 65 per cent Carnation and 35 per cent Pet.

Q. Now, you were talking about price zones. Are you aware of the fact, or have you up to this time, seen Plaintiff's Exhibit 39 which purports to set out the manner in which the Pet Company establishes its price zones for the 9-inch pie?

A. I haven't seen this before, sir.

Q. Did you know at any time that in connection with this 9-inch pie that the Pet Company simply copied your price zones?

A. They could pick up our pricing formula out in the field very easily. There's no secret. It goes to all of the trade and just like we get prices of other people, you can go into the A & P and Safeway buyers and get copies of their price lists.

Q. You mean it's customary for competitors to have identical price zones under a delivered price system?

A. I didn't say that. I said we and many others, Campbell Soup and everybody else, give a price list of their products to the buyers; the buyers in wholesale groups, voluntaries or chains. Now, your salesman or my salesman could go in there and ask to see it. If he was friendly enough they might show it to them. But that's the way you get it. You don't get it from anybody else.

Q. Now, Pet is one of the companies that makes—it also manufactures this very profitable 9-inch pie in the northern California market, isn't it?

A. I don't think that Pet has been doing too well in the northern California market with their 9-inch pies. Sure, they make it up there, but I don't think they've done too well.

[fol. 1118] Q. They do distribute in that market?

A. Oh, certainly.

Q. And you say that the prices which both of you distribute in that market is a profitable price to both of you?

A. I don't know about their price. I don't follow their prices, Mr. Alioto, except insofar as they may come in on a recommendation from our marketing department. You say they copied ours. Maybe they have. All that I say is that from what we've been told is that Pet hasn't done too well with their 9-inch in northern California. We've done very well.

Q. But they are presumably, are selling at or about the same price you are, otherwise they'd be selling more, wouldn't they?

A. Not necessarily. I think sometimes—I think in northern California we have a franchise on our name there in our file. That's not unusual. We have—the same thing with evaporated milk. You can go down here and see Carnation evaporated milk.

Q. You don't want to talk about the evaporated milk industry.

A. No, all I'm saying is—and I don't want to talk about it except—

Q. If you want to talk about it I have no objection, but do you want to talk about it?

A. No. Sometimes you can get a premium if you have a franchise, that's what I'm saying to you. I'll give you a pie illustration, if you want it. Johnson pies have a premium in southern California on 9-inch.

Q. Now, I just want to talk specifically about the Salt Lake area. It is a fact, is it not, that when the Utah Pie Company got into the business in 1958 that it didn't prevent you from improving your distribution on Simple Simon?

A. Well, we always try to improve our distribution, and I can't recall exactly whether we improved our distribution or not.

Mr. Alioto: We'll offer in evidence, if your Honor please, if your Honor please, Plaintiff's Exhibit next in order, interoffice correspondence from the Carnation Company, Mr. B. D. Eggett to John J. Juneman from the Los Angeles office.

Mr. Billings: No objection.

The Court: Received.

Mr. Alioto: This reads as follows: "Dear John: Attached are two articles concerning the Utah frozen pie operation which we believe you will be interested in. As you know, Utah frozen pies have made great strides in the Salt Lake marketing area and have just opened a new plant [fol. 1119] where they claim they are now producing 7,000 pies per day. The Utah Pie Company is a major factor in the Utah area having good distribution in major chains including Safeway. The pies are a full 8-inch 24-ounce pie and jobber costs is $4.00 per dozen on all varieties. Most supermarkets speak of the Utah pie on the weekend at 37 cents. The regular cabinet price is 39 cents. The Utah Pie is a brand currently enjoying a large sales volume on fruit pies. Our distribution on Simple Simon fruit pies continues to improve, but we are not enjoying the sales volume in comparison with Utah Pie. Regards, Mr. B. D. Eggett."

Now, then, in the light of the fact that your sales distribution was improving in 1958, it's clear, is it not, Mr. Halgren, that any price discriminations or differences between Los Angeles and Salt Lake, if they existed, could not have existed for the purpose of meeting the competition of the Utah Pie Company?

A. I don't quite understand your question.

Mr. Alioto: Do you want to read it to him?

(Question read.)

Mr. Billings: Now, I object to that question, your Honor, that it calls for a legal conclusion and has an invalid legal premise as to whether or not your distribution is improving has nothing to do with whether or not you're meeting competition.

The Court: Overruled.

The Witness: I don't think the price in L. A. Angeles had anything to do with the price up here. I think what we tried to do is to meet competition in the local areas.

Q. I am not asking that question.

Mr. Alioto: Do you want to read the question again to Mr. Halgren.

(Question read.)

A. No. My answer to that is no. We are not—what is done in the Los Angeles market has no bearing at all on what is done in the Salt Lake City market.

Q. I am not suggesting that, Mr. Halgren.

[fol. 1120] A. Well, now, wait a minute. You premised your question—you said, "in the light of increasing distribution."

You turn in a letter from a salesman. Increasing distribution doesn't necessarily mean increasing sales, and it doesn't mean by any means that you are keeping pace with the market. Sometimes the market grows from 100,000 to

200,000 cases in a single year. If you don't grow with that, you are not getting your share.

Q. May we ask you, Mr. Halgren, whether or not you know that there have been price differences between the areas immediately adjacent to your plant and the Salt Lake market?

A. I am sure there are.

Q. Where the high leg of the price was in California where the plant was and the low leg of the price was in Salt Lake City.

A. Well—

Q. Are you aware of the fact that that situation, first of all, has existed in the years from '58 to '61 from time to time?

A. Mr. Alioto, you are talking about high legs and low legs of our price. We have got a lot of areas that the price has been much lower than it has in Salt Lake. I can't tell you that at any point in time Salt Lake had the lowest price we had. As a matter of fact, I doubt very much—

Q. Mr. Halgren, would you be good enough to listen to the question. You are aware, and you will concede, will you not, that from time to time between 1958 and 1961 there was a difference in your price as between California and Salt Lake City where the low leg of the price was in Salt Lake City and the high leg of the price was in California where your plant was?

Mr. Billings: Are you talking about a continuing difference or just one particular time?

The Court: He made that clear.

Mr. Alioto: You heard me say "from time to time."

The Court: Objection overruled.

A. Mr. Alioto, I will say this, in answer to that question: I am sure that there have been times that the price in California may have been lower near our plant than it was here, and vice versa. It may have been lower here than it was in California, because always, as I have tried to point out to

you, you are concerned with maintaining your pie prices at a level that will keep you at least in the box.

. . . . . .

[fol. 1121] Mr. Alioto: We will offer into evidence, if your Honor please, plaintiff's exhibit next in order, which is a Carnation inter-office communication, dated December 9, 1960, with an adjustment or correction of that.

Mr. Billings: I have no objection.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 128 for identification was received in evidence.)

Mr. Alioto: This reads, ladies and gentlemen:

"Subject to the 8-inch fruit pie program, territory affected, Salt Lake City. Carnation Simple Simon 8-inch fruit pies were aggressively promoted during 1960. Sales results have been good. All territories improved distribution and enjoyed increased volume during 1960.

"Our objective in 1961 is to use 1960 volume and distribution as a foundation for record sales in 1961. This can be done by securing a larger market share in a rapidly expanding industry."

Now, I take it that this deal, which is the subject matter of this letter and which finally turns out to be 45 cents a case off invoice in Salt Lake City, that that is one of the deals that was approved by your committee before it was put into effect.

A. Are you asking me whether it was?

Q. Yes.

A. Yes. We approve all the deals.

Q. And was it put into effect for the purpose stated, namely, to increase the percentage of your business over 1960, rather than for the specific purpose of meeting competition to a specific customer of the Simple Simon Company?

[fol. 1122] A. Well, it is a little bit hard for me to sit here and tell you what a specific deal that you are handing

me was conceived for. We conceive deals primarily to maintain or increase our business. We always have. And, frankly, as you look at the charts, I don't think we have been on the low part of the prices very, very often.

Q. And that was the reason why you conceived that deal, to maintain or increase your business, is that correct?

A. Well, this is a letter from the Sales Department. The Sales Department says lots of things to their men. It doesn't necessarily mean that that is the reason.

Q. That is why I am asking you to tell us whether or not the Sales Department was telling the truth or not when they made that deal—

A. I don't see these letters, Mr. Alioto.

Q. Didn't you approve this deal for Salt Lake City?

A. The deal, but not the letter.

Mr. Alioto: In connection with the cross-examination of this witness, if your Honor please, we will offer the other Carnation deals from 1960 through 1961.

Mr. Billings: I believe they are already in evidence.

Mr. Alioto: Not in this form, and not with the sales letter giving the reasons why they are doing these things.

Do you want to make that as one exhibit.

(Plaintiff's Exhibit No. 129 was thereupon marked for identification.)

Mr. Alioto: And we have the same thing, if your Honor please, the Carnation deals for the period, same period of time involved, covering Spokane, Denver, and Seattle, as well as Salt Lake City, and the reason assigned by the sales personnel for the deals that were made.

The Court: Any objection?

Mr. Billings: I will object, your Honor, on the ground that the deals are already in evidence, and what the sales department has to say about it to their salesmen has nothing to do with the issues in this case.

Mr. Alioto: That is a rather novel theory. I don't think I have ever heard that one expounded before.

[fol. 1128] The Court: Overruled. They are received in evidence.

(The documents marked Plaintiff's Exhibit Nos. 129 and 130 were received in evidence.)

By Mr. Alioto:

Q. Incidentally, who heads your sales division?

A. I beg your pardon?

Q. Who heads your sales division? Who was the head of your sales division in 1959 and 1960?

A. Well, I wouldn't know who signed that letter. It is probably Mr. West or somebody in—

Q. When a letter goes out simply marked "Carnation Sales Department" and purports to give the reason for a low price in Salt Lake City, when it does that, who would have been the author—who in Carnation Sales Department, in 1959 and 1960?

A. It would be someone in the sales division, the same division Mr. West was in.

Q. Wouldn't it be Mr. West himself who had jurisdiction over that?

A. Well, it might not, because they usually have—I believe they have over in that division—and I shouldn't be guessing at this, Mr. Alioto, because I am not well enough acquainted with the organization—I believe they have people write sales letters to their men, and they may not be the top of the division at all. And Mr. West maybe could clear that up for you. I can't.

Q. I take it you believe Mr. West knows the reasons for making deals in Salt Lake City, doesn't he?

A. I think Mr. West might know why they sent this letter out, I don't know.

Q. I am asking you whether in the normal course of your organization Mr. West would know the reasons—

A. No.

Q. (Continuing) —for making price cuts in Salt Lake City.

A. No.

Q. He wouldn't?

A. No.

Q. As a sales manager?

A. No, sir. Mr. West will report to us what the condition of the market is; but he doesn't sit in on the pricing.

* * * * * * *

[fol. 1124] Cross-examination.

By Mr. Schafer:

Q. In connection, sir, with your discussions in 1962, could you identify for us briefly what the other products were you were talking about with Continental in respect to this co-packing.

A. Well, he talked about doughnuts, I believe, and he talked, I believe, about platters, neither of which we produce.

Q. What are platters

A. Well, I am talking about these TV dinners.

Q. Dinners.

A. And we don't produce them. We haven't the equipment to produce either one.

* * * * * * *

ROBERT MUTH, called as a witness on behalf of Defendant Continental, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schafer:

Q. I show you Morton's Exhibit 91 for identification. Would you state whether or not you prepared that exhibit.

A. Yes, I did.

Q. Would you state the purpose of the exhibit.

A. Well, the purpose of the exhibit is to show the selling price of Morton apple pies, of the Utah label apple pies, and the Frost 'N' Flame apple pies during the period 1958 to the date of the complaint, the end of August, 1961.

Q. Would you state the sources for your information.

A. Yes. The source for the Frost 'N' Flame price and for the Utah label price was the IBM run prepared by Mr. Zimmerman, which I think has been introduced in evidence. I don't know the number of it.

The source for the Morton prices was our invoices checked against the study done by Mr. Hereford from those same invoices, which is also in evidence.

Mr. Schafer: I offer Morton's Exhibit 91.

Mr. Alioto: I would like to voir dire, also to find out who the witness is. I don't think he has been identified. What is your name, sir?

The Witness: I think you know me, Mr. Alioto.

[fol. 1125] Mr. Schafer: He has been identified in the record as my associate in this case.

The Witness: My name is Robert Muth.

Mr. Alioto: Where do you reside, Mr. Muth?

The Witness: Washington, D. C.

Mr. Alioto: What is your position or occupation?

The Witness: I am an attorney, sir.

Mr. Alioto: And you are an attorney associated with the firm of Covington and Burling of Washington, D. C.?

The Witness: That's correct.

Mr. Alioto: Which is the attorney defending Continental in this action?

The Witness: That is correct, sir.

Voir Dire examination.

By Mr. Alioto:

Q. Now this document that you made, Mr. Muth, entitled "Morton, Utah, and Frost 'N' Flame Invoice Prices,

Sales, in Utah and Idaho, January, 1958," from what source did you get the Morton invoice prices?

A. From the invoices, sir.

Q. Are they in evidence?

A. I believe you placed some in evidence, and they were going to be checked for completeness.

Q. And these green dots, would you be good enough to explain the significance of them.

A. Yes, sir. The sales over this entire period of time were, in most cases, quite few and far between. So that this would indicate that on approximately January 12, or in that period, January 10 or 15, there would be an invoice showing the sale of apple pie at that price.

Q. Are these all of the sales made by the Morton Company?

A. Yes, sir.

Q. Now, you say the invoices are the only source of information on that chart?

A. Well, the invoices—

Q. So far as Morton is concerned.

[fol. 1126] A. So far as Morton is concerned, the invoices show everything on the chart with the exception that there, as you know—

Q. Yes.

A. (Continuing) —has been some confusion over the "PPD" on some of the invoices.

Q. All right. Now, your invoice—you have here at the bottom, for example, a 2.55 price, which you designate as f. o. b. California.

A. That is correct.

Q. It is a fact, is it not, that the invoice does not show it as an f. o. b. California, but shows it as a prepaid invoice and a delivered price into Salt Lake therefore?

A. It is true, sir, that the invoice has the letters "PPD" on it, that is correct.

Q. So in that case you departed from the invoice and put your own interpretation of the evidence on it?

A. No, sir. I believe, for one thing, some of these sales are to American Stores, and I think Mr. Degenhardt testified as to those.

The Court: I didn't hear that. Read it, Miss Reporter.

(Answer read.)

By Mr. Alioto:

Q. Then my answer is correct. In that case you departed from the face of the invoice and simply interpreted the evidence in the case?

A. I departed from the letters "PPD," sir, that is correct.

Q. Yes. Which were on the invoice?

A. Which were on the invoice.

* * * * * * *

MOTION BY COUNSEL FOR UTAH PIE TO AMEND THE COMPLAINT AND GRANTING THEREOF

Mr. Alioto: If your Honor please, we would like at this time to make a motion to amend the complaint in this action to conform to proof. Specifically, we ask that the prayer be amended—and, of course, that prayer can be amended any time up to judgment—to be changed form $250,000 as requested to $750,000 to conform to the damage exhibit submitted by Mr. Caldwell in the case, and that exhibit is Plaintiff's Exhibit No. 95.

We also ask that the date of the conspiracy which we alleged to be a time unknown to the plaintiff but believed by us to be about June of 1959, that that be changed to "be-
[fol. 1127] ginning at a period of time unknown to the plaintiff but believed to be on or about January of 1957."

We ask that those two amendments be made to the complaint to conform to proof.

The Court: Those amendments may be made.

* * * * * * *

Mr. Schafer: I want to make a motion to renew my motion for directed verdict.

The Court: Well, your motion for a directed verdict is

denied. That is all done on the requests that you handed me last night, and I denied those requests for directed verdict.

* * * * * * *

ARGUMENT ON BEHALF OF UTAH PIE BY MR. ALIOTO

Mr. Alioto: May it please the Court and ladies and gentlemen, we have now arrived at that point where all of the evidence in this case is in and we are permitted to argue what the evidence shows and to tie this evidence together for you.

I want, first of all, however, to express my gratitude, the gratitude of my associates, the gratitude of the Rigby family, first to the Court for the uniform and skilful manner in which this trial has been conducted. I think we have had a fair trial. I want to express our gratitude to you for the very close attention you have given this case. And we are especially grateful on that account because I am well aware of the fact that there has been a good deal of tedium involved and a good deal of boredom. I know these cases aren't as interesting as some of the criminal cases or some of the personal injury cases. I know that. So we have appreciated the kind of attention you have given us.

On the other hand, I do venture to suggest to you that as the years roll by and you continue to observe with some more intimate knowledge now, continue to observe the never ending struggle against monopoly power and the never ending struggle of the independent businessman to stay in business at great odds, I venture to suggest to you that perhaps, as you watch that over the years, you will feel some compensation for the tedium that you perhaps have suffered here.

Now, ladies and gentlemen, what we have in this case is a charge, basically, that three large corporations, acting individually, and in some respects acting co-operatively, have brought about a situation, consciously known by them which has resulted in injury to an independent business in this area.

[fol. 1128] There are two facets to this lawsuit. One of them is a demand or a request or a claim for damages, and this portion of it you decide, and only you decide.

The other feature of this lawsuit, which is handled by the Court, is a request for an injunction against certain practices, and this the Court handles, and this is a very important feature of this case. But the Court can't handle it unless you first find a verdict in favor of the plaintiff. And then on the basis of that verdict the Court can do, can order certain injunctive relief, which is the second element in this lawsuit.

We have charged in this complaint, and I think the evidence shows, a violation by each one of these defendants against this plaintiff and, in addition to that, certain cooperative activity among two or more of these defendants, actually all of them, which have aided and which have in fact abetted the business conduct which resulted in injury to this plaintiff.

So you, in effect, are going to find two separate things, or you may find two separate things. You may find that each one of these defendants individually engaged in a price discrimination, or a price difference, and that that price discrimination had the effect of lessening competition or tending to the creation of a monopoly.

You may also find—and you may find separately as to each of the defendants; you may find that one did it and the other didn't, although I think the evidence is quite clear on the fact that all of them did it.

Then you may find quite separately that two or more of them have acted cooperatively with respect to some of this business conduct and that this cooperative activity has had an injurious impact upon this plaintiff and has injured this plaintiff.

So we have the two separate features of the case, and they should be kept constantly in mind.

The first of these, I say, we call price discrimination, and all that means, as the Court will instruct you, is that na-

tional concerns have had in effect a two-price system, they have had a difference in their price—that is all it means in the first instance, a difference in their prices—and that that difference in the price has a tendency to lessen competition or tend to create a monopoly. This is what we call Section 2(a) of the Clayton Act.

[fol. 1129] As Mr. Lamb told you in his opening statement, this is a section that was passed in 1914, and it was passed because the United States had just gone through the bitter experience of the Standard Oil case, the classic Standard Oil case, in which the nation was first made aware, dramatically, in that case, of the type of business conduct which consisted of low and vicious price cutting in certain areas where independent businessmen were located, and simultaneously keeping the price up in the areas where those independent or regional businessmen were not located. This is the evil that Section 2(a) tried to cure.

And it has been often said, as Mr. Lamb has said it to you, and it has a special application in this case, that Section 2(a) does not depend for a violation upon their having completed the task of destruction. It is enough if you find from this evidence that the effect of this price discrimination has the reasonable probability—the Court will instruct you—has the reasonable probability to bring about this result, this lessening of competition, or this eventual destruction of this company.

I think it is pretty clear that if this continued price cutting, with the lowest prices in the country right here in Salt Lake City, if this continued price cutting had not been temporarily stopped by the filing of this complaint and the exposure of this conduct to your judgment, that this plaintiff wouldn't have any more than three or four years in this business, if they continued that kind of business again.

That is the 2(a) element of it.

On the other side, we are going to show you that where this plaintiff is not located there has been a close and intimate cooperation between these defendants. With the Pet

and Carnation it is so close that there can be no question. And we will show you, too, that so far as Continental is concerned, when we analyze all these documents, it is quite clear that Continental was willing to compete one way where Pet and Carnation were involved and viciously where this particular plaintiff was involved.

Now, the starting point in all of these things is to ask yourself the question: Who are the parties? Who are we dealing with?

On the one hand we have a small regional company with its roots very deep in this community, which for the past thirty years has been in this business. And it is the only business in this courtroom today, so far as frozen pies are [fol. 1130] concerned, that started on its own and that built its own business. Every other one got started by acquiring an independent competitor. They started on their own. They have a legitimate position in the frozen pie industry, in the pie industry. For thirty years they had been doing it, and you heard the testimony, even of the defendant's own witnesses, the testimony that this was the kind of a business where regional companies could naturally enter. It wasn't the kind of business, like the steel business or something else, or the automobile business, that required so large an investment that it would be almost impossible for an independent to get in the business.

And so this company, which has naturally been baking and selling pies in this area for 27 years, in the last three years of it then went into the frozen pie feature of it. It was a natural development, competitive development, of the business they had carried on.

Now, the relative size of these companies, ladies and gentlemen, has some significance in this case. You listen to the Court's instruction on that and, of course, only the Court can instruct you on this matter, but I think the Court will tell you that mere size in itself doesn't mean anything. No matter how large a company is, that doesn't mean anything. But size may be considered by you with all of the

other testimony in this case, in view of the fact that the charge is that companies are using their interstate profits in frozen pies and in other commodities for the purpose of subsidizing their low-cost selling in this area.

Now, you have a very graphic demonstration of the kind of size we are talking about in this case and the ability of this little company, without the help of the antitrust laws, to survive in this business. You remember this Exhibit 31, which is taken from their annual statements. This exhibit shows, for example, that the Carnation Company, in the years '58 to '61, the net sales of that company were one billion six hundred million dollars, that the net profits before taxes of that company were eighty-five million dollars. And yet in their frozen pie area their net sales were two million two, and their loss was $141,000.

Now, a loss suffered by the plaintiff company, for example, means the end of the plaintiff company. But a loss, particularly when it is a deliberate loss and a loss induced in part by discriminatory pricing so far as these defendants are concerned, that loss is absorbed in this eighty-five million dollars worth of profit. So that even one-half of that loss is paid for by the American tax-payers, and other loss can be subsidized from the profits this company otherwise has gained.

[fol. 1131] We will come to the Pet Company, and you will see that in the same period their sales were 617 million dollars, their net profit before taxes 23 million dollars, their loss in this business 118 thousand dollars.

And the Continental Baking Company, with sales of one billion 500 million, a billion and a half, their profit 74 million dollars, and this shows, except a loss in 1958, a loss in 1959, a loss in 1960 in the frozen pie business, and a slight profit in 1961.

And counsel for the Continental, in his opening statement, was glad to seize upon the fact that it apparently showed they made some money in 1961.

But we pointed out to you that in all the discovery pro-

ceedings we were told by the Continental Baking Company that they didn't have records that would have disclosed their profit and loss on frozen pies, and particularly frozen pies in this area.

And later on they put their own accountant on, who delivered a study, which I am going to show you when when I come to their deliberate selling at a loss, showed a study than in 1961, in connection with the lowest price you have heard in this case, that 2.55 price in this market, that they lost money on those sales in 1961.

We gave them the benefit of their statements, which weren't segregated as to Salt Lake and included some other wide area, which even then we didn't know what that area was; we gave them the benefit of showing some kind of profit there. The actual fact turns out to be when we finished the case, that they had these records all the time from which they could have developed those losses. And finally we have these records in this case, which I am going to show you in just a minute.

That is the situation, ladies and gentlemen, of the identity of the parties involved.

As I say, one of th great economic vices of the charge of price discrimination is that large companies can take this loss for a time because they have something to subsidize the loss out of, and they can subsidize it from profits in other areas on frozen pies and other business. Whereas, the plaintiff company can't take this kind of conduct, because if it is forced to that kind of a position—and it would have been entirely in that position if this complaint had not been filed—then it means eventual bankruptcy, eventual impairment of its assets. And what it basically means is the sad story that is going on day after day in America, [fol. 1132] the absorption of the independent by the big companies, the big national companies. That's what it eventually means. It eventually means we are going to become a nation of clerks almost, so far as independent business is concerned. We will have something to say about that later on.

Now, what about the price discrimination in this case, ladies and gentlemen. In this case, ladies and gentlemen, we have almost a concession of price discrimination by these defendants, almost a concession.

Now, it is not enough that you have just a difference in price. Something else has to be added. What has to be added is the additional feature that that difference in price tends to diminsh competition or tends—can probably result in a later period in a monopoly.

And when you see the kind of predatory price discriminations we have in this case, there can't be any question that if it were continued beyond any reasonable period of time that this 30-year-old company would be out of business, and the Rigbys would all be applying for jobs to work for somebody else.

What does the evidence show on price discrimination? Incidentally, the only kind of a verdict we want from you is a verdict that you predicate on a very cold and dispassionate view of this evidence, just what you see here in these documents and what you have heard from this witness chair, and nothing else. And we have every confidence that if that is the basis of your verdict, you aren't going to have any trouble at all with this case.

Here is the Morton Company, selling to the Fox Market in Los Angeles. And remember that the plant of the Morton Company is located near Watsonville, California, in California, close to the Los Angeles market.

Here in July of 1961 they are selling 1800 dozens of apple pie, frozen apple pie, at $4.00 in Los Angeles. That same day—one is July 7, 1961, an invoice—that same day they are selling in Salt Lake City—this is July 6 of 1961—they are selling that apple pie at 2.74.

That is $4.00 right here where the plaintiff is located, and yet when they transport it all the way to Salt Lake City, transport it all the way to Salt Lake City, they are down to 2.74.

[fol. 1133] And in that same period of time they are down to 2.85 and to 2.55, as you heard.

There is only one name for that kind of a game when it is being played by a company like Continental, and the name of that game is "get the independent." There just isn't any other name for it.

A 2.59 price, the very same month, to American Food Stores in Ogden, Utah. And in Seattle, which again is within the trading area, the trading area of the plaintiff company, and closer, as a matter of fact, freight-wise and otherwise to the plaintiff company than it is to the plants in California—in Seattle that very same day they are charging three dollars and a half, instead of $4.00, a little lighter in Seattle than they are in Salt Lake City, which is right in the home town of the plaintiff company.

That very same day in Oakland, California, which is fairly close to their plant, they are charging for apple pie $3.76.

And then what about the Denver market? Denver, obviously, is within the trading area of Salt Lake City, much closer than anything they have in California, obviously. It is a natural competitive trading area for the Utah Pie Company. What kind of price discriminations are they carrying on there so far as this Morton Company is concerned?

Plaintiff's Exhibit 83, which shows, ladies and gentlemen, a shipment from the Virginia plant—get this, if you want to know what is really going on in this case—a shipment from the Virginia plant of Morton, Crozet, Virginia, and they are selling in Virginia at that time—this is January of 1960; that is a year and a half before the other price discrimination, because it does continue all over this period of time; they do it all during the four-year period, as we will show you. In Virginia they are selling that apple pie, the frozen apple pie, at $3.80, way over here in Virginia, if we are going to follow this map out, $3.80 in Virginia, and they are selling it in Denver, Colorado two months later for $3.44. After bringing that all the way from Virginia over to Denver, Colorado, they are selling it at 40 cents a dozen less than they sell it right at the plant in Virginia. That is the Morton Company.

And, of course, you know about the famous 2.55 price. The lowest price of all is reserved right for Salt Lake City. There is no mistake about who they are aiming at, so far [fol. 1134] as that is concerned. This price was not to meet competition. You have heard Mr. Chapman testify. This price was to get a business they didn't have before, because one of the elements of this business of price discrimination is that you might discriminate in price and have a difference in price if you are doing it in good faith, in good faith, to meet the equally low price of a competitor.

But the testimony is absolutely uniform in this case that this was the lowest price, this was an under-cutting price, and there couldn't be any question about trying to maintain your own business or legitimately meet competition. It was simply a question of snaring an additional distribution away from this plaintiff company and forcing this plaintiff's price structure to erode completely to a point where the normal profits it should be making in a competitive enterprise were denied the plaintiff. This is the lowest price in the record, Salt Lake City.

The Carnation Company, you recall the deals the Carnation Company had, and the lowest deals they had, the biggest allowances they were giving, were again in Salt Lake City. This can be proved by their own exhibit. We don't even have to go out of their own exhibit in order to prove this.

In that crucial 1961 period, in December of 1961, right through to the time we filed this complaint in the hope of stopping what was going on, we find the Carnation Company in Los Angeles and Southern California, right where the plant is, giving an advertising allowance only of 18 cents, of 20 cents, of 15 cents, in '60 and '61, an advertising allowance up till March 17 of 1961 of 18, 15, and 20 cents. But in Salt Lake City 45 cents, beginning in January, 45 cents off, after transporting it all the way from Los Angeles to Salt Lake City at 25 cents a case less.

And here again, is the Carnation Company trying to meet competition? You remember the testimony that in

1960 they improved their distribution. And he says, "We want to snare additional distribution for 1961."

So the defense of legitimately and in good faith trying to meet competition just isn't available to the Carnation Company under these facts.

What about the Pet Company.

[fol. 1135] I don't think I ever saw in any antitrust case in my life the collection of witnesses the Pet Company brought here. We'll talk about that later on when we come to the Safeway case.

The Pet Company had an internal document that they had to give to Safeway, because of Safeway's prominence in connection with the enactment of the Robinson-Patman Act. They have an internal document which set out their prices all over the United States, all over the United States. This is their Exhibit 42. And they had to set out the really basic prices all over the United States, because the Safeway Company had raised the question of "Don't get us caught in a price discrimination." And they set those prices out of Los Angeles, San Francisco, Sacramento, the state in which their plant is located, on apple pie, $2.32, and in Salt Lake City the price is $2.16. That's the case. This is a 1960 document, January of 1960, that purported to set out their prices at the time for the preceding period of time and for that moment. As you know, later on, when this fight starts with Morton trying to get into this situation, the Pet Company discriminates even more viciously in price, so far as this area is concerned. For right in the beginning '59 and '60, Pet, which has attempted at the start of this trial trying to deny price discrimination, shows right in the face of its Safeway contract, $2.16, Salt Lake, Denver, Portland, Seattle, Spokane, the trading area of this plaintiff, and in California, $2.32. That's for a case. You multiply that by two for a dozen, and you will see you have a differential of thirty-two cents. And normally you would expect the thirty-two cents to be after they had transported. After they had paid the freight to Salt Lake City,

you'd think that thirty-two cents, the high leg of the price, would be in Salt Lake City, and the low leg in California. But that's not the way it is. And even their star witness, Dr. Anderson, had to say that that seemed a little bit unnatural in pricing. And yet you have that same pattern. The Pet Company, the Morton Company, the Carnation Company. The high leg of their price in California, where their plant is, the low leg of their price in Salt Lake City.

Now, who were they aiming at? Who were they aiming at.

Let's start with the Morton Company. You remember the testimony of Mr. Chapman. We have a letter in evidence from the Morton Frozen Foods Plant. These folks say the letter is mistaken. And I trust you have noticed in this case how many things reduced to writing, now happen to be mistaken. Things written at the time, when the events were fresh in their minds. But when they come to the trial, and have to explain some of these things, oh, they're mistaken.

[fol. 1136] "When I wrote Mr. Young agreed, I didn't mean Mr. Young agreed. I meant something else. When I wrote that Mr. Young agrees to send me a letter with a blind copy to me, I didn't mean that; I meant something else."

The Morton Company pulls the same stunt with Mr. Chapman. The letter states he was their broker as of September 26 of 1960. He says, "Oh, that's a mistake. It must have been later on." And he tells you that as of October 3, he talked to the Rigbys when he tried to get that proposition about "make me a broker, and raise the price, and tell the company I work for that the price of ingredients went up, and pay me the extra commission." And when the company objects that the Rigbys can't go through with it, he says, "I'm going to get a pie account, and I'm going to get you." And this is a man that Halvarson hires to do his job for him in Salt Lake City, and we know what that job was. To start with the deal, one month

later, that brings the Salt Lake price below the price in Los Angeles, and finally in desperation when they're really going to get him to go to that $2.55 price, to make that deal with Safeway, the lowest price you've heard in this case, and probably the lowest price in the United States.

Now, we know what he was aiming at. He said so. "I'm going to get the Utah Pie Company." They'll say he wasn't working for them at the time. That the man who hired him was a man named Halvarson, and you remember Mr. Halvarson came here and testified. And I think you are probably impressed with the fact that all of the evidence we have in this case was dragged from the mouths of adverse witnesses. It was literally pulled from their own people, not manufactured by us.

You remember I asked Mr. Halvarson, "Didn't you aim your price cutting activities right at the Utah Pie Company?"

He denied at first. And I called his deposition in mind to him, where he had testified under oath, when the facts were presumably a little fresher in his mind, I asked the question, "Do I understand from the testimony, Mr. Halvarson, that your price of $2.85 per dozen, on apple pie, was aimed right at the plaintiff?"

"Answer: It was aimed at him as a competitor, to get business in his customers' accounts."

Not to preserve my customers' accounts, not to meet competition in good faith for the purpose of preserving my customers. It was aimed at him to get his customers' accounts.

[fol. 1137] Then I asked him the question, "Did you ever do that so far as Pet was concerned, so far as Carnation was concerned?"

Of course, he did, "Course I did," he said. He was giving some testimony under oath when his memory was a little better and before he knew what the crystallized issues of this lawsuit were.

And I asked him at that time, and he answered under oath:

"Question: Mr. Halvarson, did you ever suggest lowering of a price to meet the competition of Simple Simon?"

"Answer: No.

"Question: Of Pet?

"Answer: No."

This is his sworn testimony.

"Question: Did you ever suggest lowering the price to meet them? Ever?"

It wasn't limited.

And Halvarson, the man who was supposed to make out the competitive reports, says no, in each instance.

So he tells you he aimed his stuff at the plaintiff, and he never, never suggested meeting the competition of either Pet or Carnation.

That's the Continental Company. How about that?

In December of 1958, we have an interoffice memorandum. It's called a Management Report.

The very famous judge named Learned Hand once said that these interoffice memorandums are just like pictures taken at the time, that record certain feelings, that record certain judgments, more surely than anything else.

This is what they write in their management report, one that was never intended to be produced to the jury. Like those Safeway contracts; they pulled out of their bag, the Safeway memorandums were never intended to be presented to the jury, apparently. We weren't even able to flush them out in the discovery proceedings in this case. [fol. 1138] But this is what they say in their internal memorandum. Competitive Activity. This is a management report, November of 1958, "Price pies are our most important competition, particularly in the Utah, Idaho and Colorado areas."

In those areas they pick out Utah, Idaho and Colorado.

What is the name of the only independent pie manufacturer located in that area? This is the areas they picked out.

"Utah Pie"—now they get specific—"is by far our principal competitor in Utah and Idaho, and the number one selling pie with frequent featurings of thirty-nine cents or three for a dollar. This same picture is true of Libby pies, in Colorado."

And listen to this sentence: "Since our recent success distributionwide in the Spokane area, price pies at the present are no longer an important factor. Montana also seems to have gotten away from the featuring of price pies."

In other words, their distribution system, whatever it was in Spokane, had knocked the price pies out of the box. And if this isn't a telegram, a telegraphing of their conscience as to what they intended to do in the Utah area, what they intended to achieve by the distribution practices, which as I've just shown you involve selling at a very low price in this area and a higher price exactly where their plants are located, as to who they were aiming at is pretty clear.

And they tell you even later on September of 1959, "Utah pies in the Salt Lake District are a constant check"—in quotes—"on our growth." "On our growth."

They aren't saying that Utah Pies are engaging in some kind of vicious competition, and we have to meet them in good faith with an equally low price for the purpose of maintaining our own customers, for the purpose of saving our own customers. They say "they're a check on our growth."

And we know the kind of growth they had in mind, the investment spending kind of growth. Where they're prepared to lose a million dollars a year to establish, as they say, a franchise in the area.

You can only translate that one way. "We're prepared to spend a million dollars a year, and lose a million dollars a year, for the purpose of washing out the independents, [fol. 1139] and taking care of the independents." Any other translation of that—investment spending is a phrase he got out of that Harvard Management School, I think. This is what it means in relation to the history of the anti-trust laws. This is what it means under 2-A of the Clayton Act, and this is what it means under the Sherman Act. And if you have watched over the years this continuing concentration of economic power, where more and more industries are being dominated by just two or three national concerns, and all of the independents are being absorbed, I think you'll understand the great wisdom behind the Clayton Act.

As I say, you don't have to have any question about who they were aiming at in this case, and whose competition they were meeting. They've confessed it.

Now, what about this other business? I suggest that you keep one rather important distinction in mind.

So far as this two-price system is concerned, where the low price is where the independent is and the high price is out at the plant, where they are themselves, where they're just competing against themselves for the most part, so far as that's concerned, you don't have to find that that low price is a sale below cost. You don't have to find that. All you have to find is there's a difference; that there is a high leg and a low leg of a price system at or about the same time, for the same kind of pie, of like grade and quality. There's no dispute about that in this case, that they are of like grade and quality. They're selling precisely the same pie under precisely the same label, at these different prices, and the low leg is for the independents. Now, you don't have to find, for the purposes of Section 2(a) of the Clayton Act, that that leg is at a loss. But where you find as you have in this case, that that low leg is, in fact, at a loss, that all three of these national com-

panies have that low leg of the price at a loss, then you have a right to use that evidence, as the Court will instruct you, to determine that there's some ulterior purpose behind that thing, and you have a right to use it in connection with the charge that there's a combination here, that three of these companies were prepared, all of them, to sell in this area at a substantial loss over a long period of time. And there's no question about the loss. It's admitted by everybody, except Continental. Except Continental. And they started out telling us, you remember—he seized upon that exhibit that was made up from his own documents, which he didn't delineate the Salt Lake area—had some wider area involved, Wyoming and some other area, as I recall it, and he says, "Counsel concedes that we made money." Then he put his own witness on the stand.
[fol. 1140] I'm talking about Continental now, because this is the only thing that has to really be corrected, this phony profit figure they gave us in 1961. They admit, even on their basis, losses in 1958, '59 and '60.

But they finally put their accountant on the stand to prove that over the entire period they made what he called a gross profit.

Now, you remember all about this, this attempt by these very learned accountants, particularly the one from New York, to tell us that so long as they made a gross profit, that was it; that a net profit didn't really matter. But the gross profit was the important thing. But even on their basis of this gross profit, or this contribution to profit—and you remember they all acknowledged to me that if all of their business was carried on on the basis of these contributions to profits, they'd be broke, if all of it was done that way. Well even on that basis, that basis, the Continental Company, you will see in 1961, when this vicious price cutting took place, in 1961, on the basis of their own exhibits, separate losses in Idaho Creamery, on gross-profits basis losses to the Associated Foods in Pocatello, losses on the Safeway deal, losses on all of the $2.55 prices

and $2.85 prices that were here. This is their own exhibit. They had to put somebody on the stand to explain these other losses, and in the process they established the fact that when they got down to the really vicious price cutting at $2.55, which if it hadn't been stopped by this complaint would have knocked these people out of the box in a matter of two or three years, when it got down to it they were selling below cost even on their kind of accounting. And that kind of accounting has best been described as trying to show a profit on the theory that everybody works for nothing. But you don't allocate the expenses of the business, expenses of the managers, the expenses of the Kitchins, the expenses of the Halvarsons, the expenses of the Vails—and other distinguished no-show, that they'll—the expenses of all of these men that run the show for these people, if you don't allocate those expenses, and if you don't allocate the expenses of the girl that worked in the office, the work on the very requisite invoices relating to this area, if you get that for nothing, then they say you make some kind of a profit. But even on that theory, the Continental Company, in 1961, is showing a substantial loss.

So we have all of these companies, during this period of time, with the low leg of the price, on the basis of a very substantial loss. And I say that when companies continue to sell at a loss, in a local area, where an independent company is located, that there just isn't any other name for that. There just isn't. They're out to get them. They're out to injure them, or to imperil them, so they can pick them up the way they picked up these others.

[fol. 1141] It just needs saying, because of the way some of the Continental people have asked in this case, that just needs saying that they are not only apparently determined to injure the independents here, but they get some poor co-packer out in Watsonville and he's in the hands of creditors, after packing for the Continental Company. And they bring somebody here—and I couldn't understand this

one—they bring someone here to prove that he really didn't lose money under the Continental co-packing arrangement, because he had a claim against a box company which, if honored, if honored, might have resulted in a small profit. And this is what the accountant of the Continental Baking Company came out to explain to us, and he had to tell us inadvertently that the people he did this work for was the creditor's committee that took over his co-packer out in Watsonville.

Now, there's an element of this selling below cost that even gets more vicious. In this case, these big companies, to the last of them, budgeted these losses. They programmed the losses. This isn't the case of somebody just going into the rigors of a competitive situation, or a competitive market, and then achieving a loss as a result of the market place. It isn't this, at all. Here are people who sit down and budget losses. And the biggest losses they have budgeted in this case are the losses for Salt Lake City, where the independent houses are. There aren't too many of them left. And remember that this is the only independent in the entire country which, under the undisputed testimony of the internal documents of the Pet Company, the only independent in the entire country, that the Safeway Store, that the Safeway Company felt was able, besides the Pet Milk Company, to pack pies for Safeway—the only one in the entire country.

So when you see these big companies taking and budgeting and planning these losses, with the greatest losses, the most intense losses right here in Salt Lake City, where this little company is, you don't have to go very far to find out what kind of a business this is getting to be.

Now, ladies and gentleman, there is nothing under the rules of evidence that compels people who sit on juries, to come, bring blinders with them into a courtroom. They are supposed to use the ordinary reason with which God invested all of us, the ordinary reason to look at these facts and to make inferences from facts, not speculation

from the facts, as to what is really going on in these companies.

Now, there's one other thing on the business of who are they aiming at in this case. You remember that testimony about—first of all, we have Halvarson saying directly,—the Continental man—that he never, never suggested meeting [fol. 1142] the competition of either Pet or Carnation. You remember that testimony of Nord, and that little interoffice memorandum marked "Personal"? I don't know why it was personal. It was a business thing, in which he tells his superiors how disappointed he was that his superior wouldn't let him meet the Carnation price cut of twenty-one cents, which it started in Idaho and extended down to Utah, how disappointed he was. But he promises not to pass on that information to his salesmen.

I want you to take that in connection with the other testimony of the general sales manager of the Carnation Company, who doesn't even know who fixes his price, who fixes the price of the Carnation Company. The general sales manager tells you under oath that he doesn't know who fixes his prices.

And so we have the classic situation that was best exemplified in the recent electric cases in Philadelphia, where the pricing authority—you remember, this price is everything. The man that controls price controls the business—where the pricing authority is kept segregated from the salesmen in the field, who are kept ignorant of the reasons for the pricing, and in the field they think they're engaged in some kind of a big competition. But the pricing authority in this case told them, "I won't let you meet them, but don't tell your salesmen about it." And he says he won't tell him. Mr. Bennion, you remember. He won't tell him.

Now, ladies and gentlemen, I want to talk to you about another feature of this lawsuit. And that is, I think it's perfectly clear on the basis of absolute confession that all three of them have violated 2-A of the Sherman Act, the price discrimination section. They've almost confessed

it. They're going to give you a lot of excuses, and a lot of charts, not one of which didn't have a gimmick in it, if you remember it. Not one of them didn't have a gimmick in it. They've almost confessed that.

Now, what about the cooperative activity? Is there evidence in this record that these people were acting other than independently, on the basis of independent business judgment? To begin with, you can't ignore the objective external fact that all of them sold in this area at a substantial loss, and were prepared to do it over a long period of time, while acknowledging that they weren't competing against themselves. The business meant to make money. And any time you find them programming for a long period of time substantial losses in a given area, where the dive bombing seems to be around where the independent is, and the higher prices seem to be outside of the independent, and when you find all of them dealing simultaneously, it's pretty clear what's going on.

[fol. 1143] But in this case we have actual evidence, in addition to what we are talking about—in this case we have actual evidence of the opportunity to collaborate. You can't ignore the fact that the president, Mr. Gamble, the president of the Pet Company, whose demeanor on the stand and whose testimony you were not privileged to hear, after he built himself as a starter in this race—you can't ignore the fact that the president goes down to the Carnation Company four times a year and sits in with the top executives of the Carnation Company in connection with a milk business, a joint venture business they have in this country and throughout the world, and that that company as divided 35 per cent to the Pet Company and 65 per cent to the Carnation Company and that they have been making, as their annual reports show, a million dollars a year in dividends from that company, that million dollars that will very easily wash out the losses they have to suffer in Salt Lake City. You can't ignore the fact, because it is there, and you can't ignore the fact

—talk about it as they will—you can't ignore the fact that from 1957, apparently right down to 1962, the Morton Company and the Carnation Company don't think that there is any real problem about their having a co-packing arrangement in California and a co-packing arrangement back East, where their costs are obviously divulged to each other, where their costs are obviously disclosed to each other. You can't ignore those facts.

They can say those co-packing arrangements are very common in the industry. That may be so. But so are combinations and restraints of trade common in the industry, too, in other industries.

But when you know they are here engaged in a low-cost, vicious, price-cutting deal in Salt Lake City and that they are all doing it, and you know they have this opportunity to converse among themselves, and you know they are considering having co-packing arrangements among themselves, it is hard to ignore that, particularly when their men take the stand and, under oath, have to tell you that they never—this is the Morton man—never suggested meeting the competition of Pet, never suggested meeting the competition of Carnation, but always insisted on this vicious price-cutting in Salt Lake City.

And you have these other people that they just haven't even tried to explain.

In 1957, before this plaintiff gets into the business, we have a man named Wilson Hall, who was a national sales manager, or the sales manager, for the Pet Company, writes an internal memorandum again, Exhibit 39, one of those cold, hard, dispassionate facts is pretty hard to get around, writes an internal memorandum in which he states [fol. 1144] that so far as his 9-inch pies are concerned he has the prices and the zones, the prices and the zones of the Carnation Company, and in this case he is going to price the Pet product so as to make a reasonable profit, is what he says.

"Since it appears from market studies that Simple Simon is doing considerable pushing of 9-inch pies at institu-

tional and restaurant levels, we feel that in order to be competitive and make a reasonable profit on our item we should set our prices along these lines."

And they set to the penny the identical prices of the Carnation Company and adopt the identical zones.

There is one slight exception on this identical price. In California, Zone 1, the ex-truck price is 5.78 and 5.94. Down here the Pet price 5.78 and 5.94, identical, identical price, identical differential, the identical prize zone consciously adopted.

And you remember Mr. Harsha, who apparently didn't know about this memorandum, when I suggested that anything like that happened, he said, "Of course not. It would be unnatural for something like that to happen."

You can use his testimony about the meaning of this in relation to whether or not there is a combination here.

On cherry, raspberry, mince, rhubarb, and blueberry, 6.68 Carnation, 6.84 ex-warehouse, 6.68, 6.84.

We get down to Oregon, Washington, Utah, Idaho, Wyoming, and western Nebraska—and I will have something to say about that western Nebraska. They give you a zone chart here, they give you a zone chart here, in which the Carnation Company indicates it is not in western Nebraska, but Morton is. See, this green line extends out here and it is not the same.

If the Carnation Company have given you a prize zone based on this data they knew was in evidence, you would have had western Nebraska, too. So that zone would be identical, too, Morton and Carnation, as well as Pet and Carnation.

In that area, 6.20, the Utah area, 6.20, 6.36, identical, 6.20, 6.36.

[fol. 1145] Do you observe in this pricing that normally and naturally, before the plaintiff is in this business, that the lower price is in California and the higher price is in Utah? This is the way they do it when they are dealing with themselves.

The normal commercial acceptation is that the lower price would be in California where the plants are and the higher price in Utah, and not, as when the plaintiff gets in the business and they identify him not in the target area, but the actual target, this considerable lowering of the price in this area at a substantial loss, as against a higher price out in California.

And they go right down the line, but there is a big difference, that I must call to your attention. There is a big difference.

At one area they say, "Other Flavors," Carnation, 7.10 and 7.26. And these folks don't say "Other Flavors," but they say cherry, boysenberry, mince, and blueberry, 7.08 and 7.24, a 2-cents differential on the so-called "Other Flavors." It is easily explained in terms of cost of production and other matters.

But here is identical pricing, identical zoning, right in the beginning, with natural pricing where the plant is concerned and natural pricing further away.

Has anybody tried to explain this? Have they brought Miss Eunice Cox out from the Legal Department of the Pet Company to try to explain this? Have they set up price zones to reflect this, their own exhibit, instead of the phony price zones they gave you, which don't reflect what the zone exhibits show? They haven't done any of those things. They haven't even tried to explain it.

Even if conscious copying of a price lead, this conscious copying of a price lead, has to be explained when the one that is copying is the bigger, the bigger and the national concern, as against a regional concern, which is Carnation, which distributes up to the Mississippi pretty much and a few places in the East. The bigger company consciously copying, and then the price lists come out on the exact basis.

And you remember the Pet Company had this MRCA, Market Research Corporation of America, that seem to be doing all of their thinking on the market surveys and the rest of them.

[fol. 1146] The evidence shows that at or about this time these price zones of the Carnation Company were apparently set up in consultation with that same organization, MRCA, at or about the same time. And when their price lists come out, they are substantially identical. We took the actual price lists that followed this announcement that they were going to do it.

Then there is another little interesting item here. Mr. Murphy of the Carnation Company is explaining on January 5 in the minutes of one of his committee meetings, is explaining—

"Murphy presented Deals 7 and 8 for a period February 13 through March 17, and explained that since the proposal was developed—" since it was developed, he says. "—Pet-Ritz had announced a January deal of one case of apple with 10, followed by a deal of 30 cents per case off the face on cherry in February."

On January 5 Murphy is telling them that Pet-Ritz is going to have a deal in February on cherry, and on January 24 Pet-Ritz announces to its own salesmen that same deal on cherry for February.

Apparently Murphy knew in advance what Pet-Ritz was going to announce to its own salesmen a month later.

I have already pointed out to you that little personal memorandum. Remember how it was set up. You can hardly read it. This is the copy we got in the case. We have a typewritten copy of it for you so you can read it clearly.

Mr. Nord to Mr. Coleman, marked "Personal," telling him how sorry he is that he wouldn't let him meet the Simple Simon deal in Utah. Not talking about some other area. In Utah, Pet couldn't meet Simple Simon's deal.

Why does he mark it "Personal"? What is so personal about a business assignment, except that the writer of the letter knew that there was a fix on between Carnation and Pet.

Mr. Ellis is able to report in their management report Simple Simon and Pet-Ritz fruit pies are at equal prices except in the Salt Lake marketing area where Simple Simon has 21 cents per case allowance June 1 "until further notice."

[fol. 1147] Back in 1960. When you read that you would think there was some real competition going on in the Salt Lake area, wouldn't you? Except that you have this other "Personal" note, which explains the fact that Pet wasn't permitted to meet that competition in the area.

This is the way it goes, ladies and gentlemen, this constant acting of one way when they are talking and when they are dealing with themselves, and when they are dealing with the plaintiff this vicious price cutting, this selling below cost, and yet when they are dealing with themselves pricing differently.

Before I leave these price zones—now, we know that the Carnation zones aren't the way they were set out in the letter on their own price lists in this matter. I asked Mr. Murphy about it, you remember, and said, "What period of time is this map talking about?" He didn't know anything about it; somebody else prepared the map; they aren't the way.

Let's look at even the way they put them. See this Morton zone, which is the green line. They have substantially the same zoning for California. The Carnation plant is down here in the Los Angeles area. The Morton plant is up here in the San Francisco area pretty much where the line is.

In natural pricing you would suppose that the Morton Company wouldn't have the boundary line of a zone where the plant is. You would think that everybody equally distant from the plant would get approximately the same price.

Let's get this zone pricing and delivered pricing system in focus, ladies and gentlemen. Nobody contends that an individual company, acting alone and acting independently on its own business judgment, can't set up a delivered price

zone. Nobody contends that. There are circumstances, business circumstances, which, in unusual cases, not usual, unusual cases, might make that desirable. Yet nobody can contend—and even Dr. Anderson had to admit this—that substantial similarity between price zones where the costs are different and the plant locations are different is the most cogent evidence of combination and conspiracy, the most cogent. Everybody within the area gets the same price.

There are uniform differentials between the prices, as I have just read to you, uniform differentials between the places, all in the area. When, as here, for example, the plant is located right on the green line and the Torrance plant of Carnation is down here in the Los Angeles area, and the [fol. 1148] Fresno plant of Pet is over in this area, and yet the price zone of Morton is right on the line. It is an unnatural price zone.

Let me tell you something about conspiracy. We don't like to use words like "conspiracy" in connection with businessmen, even the kind of businessmen that have these rendezvous in warehouses down by the railroad track about burglarizing or breaking into other plants. We don't like to use that word "conspiracy," because it has a harsh sound.

But "conspiracy" under the antitrust laws means something different than the kind you are thinking about. You listen to the Judge's instructions on that. It is very important. It doesn't require criminal intent in this sense. It isn't something like three people in black coats and black hats meeting at midnight in an alley somewhere. You have a little bit of that in this case, but that isn't it.

All "conspiracy" means under the antitrust laws is a combination of businessmen acting cooperatively and consciously toward a goal which results in restraint of trade, like price fixing, or injury to a competitor. It doesn't have to be a formal agreement. It means, basically, an agreement or a concert of action. It doesn't have to be a formal or a written agreement, or even an expressed agreement.

If they all act or in effect are invited to act in a certain way among themselves and in a different way where a little independent is involved, and they act that way—and you can use these unnatural pricing zone arrangements as evidence of that—that is all a conspiracy, under the antitrust laws, means. And as business has become more sophisticated in attempts to avoid the antitrust laws, the law permits proof of conspiracy to come from the kind of conduct we have talked about in this case.

And it is logical, too, as I said before. You don't need blinders on your eyes. You can look at this business conduct and know that these people are competing one way among themselves and another way when this little plaintiff is involved. You know that quite clearly.

And that takes us now to the Safeway contract, the Safeway memorandum.

As you know, this memorandum that everybody seems to disavow, and it took us three days of trial to find out who wrote it—this memorandum didn't come along in the discovery proceedings. We got this memorandum because it happened to be in somebody's suitcase.

[fol. 1149] Now, it is strange, really, that Mr. Wohlhueter should have had that memorandum, because, to listen to Mr. Harsha speak of it, and to listen to Mr. Schenk speak of it, you would think that the memorandum was written as kind of a lark, something that Mr. Harsha put in his pocket, and wasn't a business record. And with this kind of a memorandum I don't blame them for trying to make it look that way.

But, in any event, what they are talking about in this memorandum—we are speaking against the background of a contract, the Safeway contract. You don't have to be Einstein to know what that Safeway contract is, despite the way these people talked about it. This is a total requirements contract. It is expressed as a total requirements contract. It is a circuit contract involving a circuit deal with all of the Safeway Stores throughout

the country, and the effect of this kind of dealing, when you tie up all of the stores on a price which is predicated upon a million to two million guarantee, the very effect of this kind of contract is to shut out the independent in the area, the very effect of it, because normally you would suppose a competitive advantage on a competitive arrangement, the Utah Pie Company, because it was located here in Salt Lake City and because it had a competitive advantage in connection with the Utah market, the Idaho market, the Colorado market, the Washington market—you would assume normally that in a normal competitive situation the Utah Pie Company would have had the Bel Air contract for its own area, not for the nation. Nobody ever wanted it for the nation. Just for its own area, the natural assumption of it.

So when they get together and make what we call a total requirements contract, based upon all of the Safeway Stores, in all of the states of the United States, the obvious and necessary consequence of doing that is that the independent in the regional area is shut out, the natural consequence of it.

Their contract starts out: "The quantity involved"—

You don't have to listen to people trying to explain away things they don't like. You don't have to believe everything they say. You have a right to look at the demeanor and the manner in which witnesses testify.

The Court will tell you this. The credibility of the witnesses is your sole function. It doesn't belong to anybody else. It doesn't even belong to the judge in this case. It belongs to you, the credibility of witnesses. It doesn't belong to the lawyers. It belongs to you.

[fol. 1150] And really, really, have you ever seen in the courtroom a collection of witnesses such as that collection Pet brought to this stand in connection with this Safeway contract, belonging to a responsible, reputable, company. Do you remember Mr. Dittman? Mr. Schenk—I felt a little sorry for him. Here was a good man, cor-

rupted by the demands of a corporation, forced to do things that he thought would result in his promotion, like these General Electric people. And he finally winds up as the head man. I think basically he was a good man.

But that Dittman. If you ever in your life saw a more transparent—I don't want to use a hard word now—a more transparent attempt to conceal the truth. I hope you remember him. This was a Saturday morning witness. A more transparent attempt to conceal the truth. And Harsha, a more transparent attempt to conceal the truth.

If you ever in your life saw two men doing it, you saw it in this courtroom.

It doesn't make us proud, because all of us who believe in the antitrust laws are weathered to the notion that the great progress of America has come about as a result of our competitive economy and the building even of these big companies, because the big companies have given us a wide distribution, a wide selection of goods, at a low price. And when they are competing, and when they are competing with the independent, and they let the independents into the act, and the independents keep them on their toes, this is the greatest thing that can happen and it has developed the greatest system in the history of the world. So we don't feel proud when we see men like that. I don't want to call them "liars"; it is a harsh word. I want you to make that judgment. But you saw them. You saw Dittman. You saw Harsha. You make that judgment as to whether or not they were coming clean with you.

And you saw Young try to explain that this isn't a total requirements contract. You saw Young try to explain that he didn't really agree to write these letters with a blind copy. And you saw Harsha try to explain that when he said Young agreed to write a letter to each Safeway manager, that didn't really mean "agreed." "Agreed," up here, where Young agreed to that 6½ cents per case reduction, that meant "agreed." But down here it didn't mean "agreed."

And when you heard them say there was no discussion about not being able to have your pies manufactured by competitive organizations and then you heard me read that letter written by Mr. Schenk to Mr. Young, in which he states specifically and unequivocally, in our Exhibit 42:

[fol. 1151] "In Paragraph 4 of the amended contract, we have deleted completely the sentence 'if seller is unable to deliver the two million case quantity buyer shall have the right to secure supplies from other packers in the amount seller is unable to deliver.'"

In other words, they deleted this notion that he could go out and get it from somebody else if the Pet Milk Company couldn't deliver. And yet these men took the stand and told you that subject was not even discussed. But there is the basic fact that can't be denied at this stage of the game, and that is that except for pumpkin and mince, which are a kind of specialty, seasonal product, that not one competing manufacturer has manufactured one fruit pie for the Safeway Company except the Pet Milk Company under the Bel Air label. This is a fact that can't be denied.

In any event, I say you saw this whole sorry performance, and you put your own analysis on it as to what it means, what it means in terms of combination and conspiracy.

Now, you heard all this other conversation. Morton was out competing. Carnation was out competing. They were all competing for the Safeway business. This is what you heard from the stand.

What was the internal statement made to people when there was no reason to lie, when there was no reason to do anything? What was the internal statement made?

"As far as the Safeway production is concerned," writes Mr. Schenk, after his break-through or break-in at the Utah plant, "As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily

remedied, and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves."

Not Carnation, not Morton, not anybody else. Presumably these Pet men, which were head of the division at the time of the trial, and Dittman, the man who received the memo. He said he received the memo and then put it away, you remember, didn't mean anything to him. Dittman was the head negotiator for the Safeway contract. They knew who their competition was.

This is the kind of thing you ought to believe, and not these protestations that are made for the record in trial. [fol. 1152] The only competition they had for the Safeway contract was the Utah Pie Company, and they recognized it themselves.

And what about this inter-office memorandum? I want to put certain facts in perspective for you, ladies and gentlemen. Mr. Dittman did tell you that he instructed Mr. Schenk to go out and find out what made the Utah Pie Company tick.

That's my language, "tick." If you remember, he said, "Go out and find out why it is they're able to do what they're able to do," and instructed him to go out, so they would know that. We know that he had a commission to do so, go out and find out what made the Utah Pie Company tick.

So he, of course, gives you this conversation: "I just happened to be here on a vacation in Idaho, so I dropped in to the plant in Salt Lake City."

Do you think that explanation sounds unreasonable? "I happened to be on a vacation in Idaho, so I dropped in to that plant." How did he drop in that plant? He goes down to a warehouse by the railroad tracks, and he meets with two men, and together they concoct this scheme of spiriting Schenk into the plant on the false representation that he was a broker in the Northwest who was interested in the Utah Pie Company. That in the antitrust laws, we call this industrial espionage. Let me say a word

of caution here again. We are not trying a burglary case here, we are not trying a breaking and entering by false pretenses. And so far as the antitrust laws are concerned if this is the only thing that happened it had nothing to do with the antitrust laws. But when we are trying a case which involves a combination directed against an independent for the purpose of injuring that independent, then industrial espionage of this type is very relevant evidence to show what this combination was, and what the scope of the combination was, and to show moreover what the very meaning of this kind of activity was. It's very relevant evidence in that case. And you are not to give us a verdict because they only did something wrong, we're not asking that. You're to use this in the light of all the evidence, and see clearly that it is a part of a combination to get this plaintiff, as Mr. Chapman put it, or as the others put it, to compete against the plaintiff, to take away his accounts. And in this they want a real stake. They were fighting for, two million cases were involved, 40 per cent of the total Pet business. And their own acknowledgment that the only real competition they were getting from it was from this little family here in Salt Lake City.

[fol. 1153] He goes on, he makes his report, and he tells us what a wonderful plant this is—the sanitation is fine, we don't get any of this conversation about quality control or any of these other things, then he winds up this report in which he says, in substance and effect, "Here are the four points, easily remedied, but I am going to give you these points so you can go out with Safeway and spike the Utah Pie Company, and sabotage the Utah Pie Company."

You remember after a long time he finally admitted that's what his language meant. You don't need his explanation. It's quite clear. Just read it to yourselves.

"As far as the Safeway production is concerned, I found very few points where they would have a problem with

Mr. Young. Some of these are quite easily remedied, and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves. The points you might use are, one"—and among other things, he named them—"(3) Lack of technical quality control personnel."

Now, Dittman gets up and gives you that fairy story about the fact, well, he doesn't remember whether he got this thing, but he must have got it, but he's absolutely sure he took this thing and put it in his files and never referred to it again. Now, if you want to believe that Mr. Dittman commissioned Mr. Schenk to go out and find out what made the Utah Pie tick, okay. And that after Mr. Schenk did it, by this disreputable means, went to all of that trouble, and went to the trouble of writing a memorandum which he sent to Mr. Dittman, and which in addition to that he sent to Mr. S. P. Harter, the chief managing agent of this company below Mr. Gamble, Mr. Ellis and Mr. Leutwiler, all superiors, if you want to believe that this was just done on some kind of a lark, and that when Dittman got it he put it away, read it casually, didn't again refer to it, and didn't use it, if you want to believe that story he's told you, I submit, ladies and gentlemen, that it's a story that's an affront to intelligence, it's an insulting development. Because there's a very interesting chronology here. And the chronology is that Gaylen Rigby was in Mr. Young's office one or two days before June 23 of 1960. Now, why will Mr. Young come here and tell you under oath that he never said that the Utah Pie Company was the first processor that he felt capable of producing for him? Where else could Schenk or Dittman have received this information that Mr. Young felt that the Utah Pie Company was the first one he found capable of producing? Where else could they have received it, except from Mr. Young?

[fol. 1154] And so when Mr. Young takes his oath, and looks you in the eyes and keeps telling you that "I never

said anything like that," then you're ready to believe one of two things. One, that Mr. Schenk is some kind of a fellow who's deranged, and who has hallucinations, and who attributes things to Mr. Young, or else you have to believe that Mr. Young maybe wasn't coming clean. I don't think you have any alternative. Either Schenk was deranged, made up things, didn't understand anything, or else Young wasn't telling you the truth. You make that choice, ladies and gentlemen. I have every confidence as to what it's going to be.

Gaylen Rigby was in Young's office two days before this, and Young had from Gaylen Rigby a lower offer on the fruit pies for Bel Air, that's uncontradicted in this record. And when I asked Mr. Young, you remember, "Would you take the word of your Mr. Shelburg, who told these people in the Utah Pie Company that he saw no reason why they couldn't produce for Safeway, and they had a very clean plant, he tells you, "Oh, he doesn't know anything about it. He's my man, all right, but he happened to be in the area so I sent him in to talk to the boys so he can learn something about the pie business. See all of these explanations?

And finally on December 30 Mr. Young writes to Mr. Rigby on these fruit pies, and says, "We aren't going to let you pack for us even though your price is lower in one instance. We aren't going to let you pack because, among other things, you have a big quality control problem in your plant."

Now, all quality control means, ladies and gentlemen, is that they don't have a bookkeeping deal, basically, to follow out every step they make. But since they pack the pumpkin and mince for them already, and since Mr. Schenk testifies to the fact that an internal memorandum where he had been telling the truth to his own people, that this plant could pack for Safeway, if you believe that testimony of Mr. Schenk's, given at a time when he had no reason to be evasive, no reason to obscure the truth, then

it's perfectly clear that Young never intended to do anything except abide by his total requirements contract with the Pet Company, and take his one and two million cases from them, and none at all from the man who was in a competitive position to serve that area, and who but for this little combination would have had that business.

Now, ladies and gentlemen, I want to talk to you about the third element of this case, and the last element.

[fol. 1155] There are three things that a plaintiff has to prove in these cases: first, that there's been a violation of one of the antitrust statutes; secondly, that there has been an injurious impact upon that plaintiff and, third, that he is somehow able to put enough economic facts before you folks as to have you make an estimate of what that damage is. Only an approximation. Nothing more is required.

Now, I say on the violation of the law, both with respect to combination and individual action, I think you have almost a confession in this case.

Has there been an injurious impact? There has been an obvious injurious impact in three elements:

One, there was an erosion of that price, from about a $4.15 and a $4.30 level down to a $2.75 level. That's the first thing.

Secondly, these tactics, when you are selling for $4.00 in California and $2.50 here, these tactics diminish the volume that Utah Pie Company, in a normal competitive market, would have achieved.

And thirdly, there is an injury to what we call good will as a going concern. Now, that's a concept that you're not going to have any trouble with, those of you who have some business experience, a little business experience, or independent business experience. It's a concept of where, you have a plant that's operating normally, in a competitive market, against all competition. And anybody is always free to build another plant in Salt Lake City or in

Ogden, or Denver, or any other place, they are always free to do that. Or anybody was always free to charge as low a price as they wanted in Salt Lake City, so long as they lower it everywhere in the United States, without discrimination. They're always free to compete that way, but the legitimate way. But where you have a business that has its volume, that gets a normal Safeway business it should get in normal competitive circumstances, that has its production machine going, its costs lowered, that business has a going concern value, as we say. It is a very discernible thing. It's like the value of property. It's a very discernible thing, in addition to lost profits and lost volume.

And these are the three elements of damage: an erosion in the price structure of Utah Pie, brought about by this vicious price cutting, this below-cost price cutting, this discriminatory price cutting, the erosion of the price, the loss of the volume, and the injury to good will.

[fol. 1156] Now, normally when we talk about damages, ladies and gentlemen, it's important to understand that in this type of case you don't have to find damages worth mathematical certainty. You listen to the instructions of the Court on that. The Court will tell you that. And the reason why the law has developed in that fashion is because the very conduct, the wrongful conduct of the defendants has made it impossible to determine the damages to a mathematical certainty. So the law in this case, as the Judge will instruct you, tells you that based upon relative economic facts, not guessing or speculation, relevant economic facts—and we have them all in this record—base it on those relevant economic facts, once you are sure that there has been the violation, sure in the sense of a preponderance of the evidence, and sure that there has been this injurious impact, then from all of the relevant economic facts—you've heard about this market, about pricing, about costs, about specific customers, about price discriminations, about what they're charging in California,

about what they are charging in West Virginia—from all of those relevant economic facts you may form a judgment based on estimate and approximation, of what those damages are.

It does not require mathematical certainty. And I say that because some of you may have been in contract actions, of one kind or another where damages, too, have to be found with some kind of mathematical certainty. But in this branch of law, it doesn't have to be. Damages do not have to be found that way, because the very conduct of these defendants has made it impossible. It's not too unlike, in many respects, those actions, those tort actions, where people are injured, in one form or another.

Now, it's impossible to get a mathematical certainty, for example, on what the value of a broken arm or a dismembered arm is. It's impossible. But you get a lot of facts—the age of the person, the law expectancy of the person, whether that person is a pianist, an artist, an actor, or whether it's a workman who needs that arm, or whether it's a person who has a desk job, you get all of these facts, and from these facts you get a judgment as to the approximate damages involved. And that's the way it is in these cases.

There has been an injury. Instead of an arm being injured, a business has been injured. It's going concern has been injured, it's price has been injured, it's volume has been injured. And you get all of the facts. And we have in this case more economic facts than there are in most of the Supreme Court cases involving proof of damages. Much more, in fact. You take all of those things into consideration, and then you make an approximation. [fol. 1157] Now, all we have done on this chart—which is your key damage exhibit—all we have done on this chart is to do the arithmetic for you. And you aren't bound by any of the figures on this chart. All you are bound to do is to look at those facts, and then refer to the chart for the arithmetic, which it would be impossible for you to do.

Now I will explain in detail in just a moment. When we first talk about proof of damages, the very first thing we try to prove in these things is that the plaintiff company is a good company, with good personnel; that the plaintiff company didn't fail for lack of management, lack of financial resources—and in this case we don't have to prove that. The defendants have proved it for us. Mr. Schenk's own internal memorandum tells us what a very fine organization it is.

All of them tell you the Utah Pie Company is a permanent factor in this area, and it's hard to beat because its client is here, and it has interested management.

There's no substitute for workers like these four young boys who have this plant for tomorrow, if there is a tomorrow for them. And if this complaint hadn't been filed, there wouldn't have been a tomorrow for them. When you have those young boys who have their heart and soul in the business, it's a pretty hard substitute. And when a man of the eminence of Mr. Lamb comes here from Washington, D.C.—and this I could never understand, and won't ever understand, except that we all have our human laxes, and we make mistakes—comes here and suggests to you that these people are getting exorbitant wages. I just wonder what he could be thinking about, what he could be thinking about.

These people working 60 and 70 hours a week, and getting over a years time—all the boys get the same salary, as the records show, $11,600 a year, for 60 hours a week of work, and we have an eminent man come to you from Washington, D. C., not only tell you that these are extortionate salaries, unreasonable salaries, knowing that he's representing a 38-year-old president, who is the nephew of the boss and who won't come here, getting $75,000 a year, and $10,000 in expenses, knowing all of that, this eminent man comes out here and tries to convince you that these four boys sitting here, those 60-hour-a-week boys, are somehow stealing some kind of profits from this busi-

ness, that you should say take away from them in your damage computation.

[fol. 1158] I never, in all of the experience I've had in these courtrooms, heard so insolent a suggestion made by anybody. Never. Never. And not only that, they make a chart of the thing, which I can't help but describe except as an attempt to confuse you, a deliberate attempt to put these salaries on top of profits. Here are the profits. (Indicating) Salaries have nothing to do with damages, as these gentlemen know, and their pretty charts don't make any difference. These are the profits that the Utah Pie Company has made. And these are the profits involving capital gains, some of which have nothing to do with the frozen pie business. So they put an overlay on it of salaries on the assumption that salaries and profits have some relation, and nobody more than Mr. Lamb knows that there is no relationship between them. Absolutely no relationship between them.

The laborer is worthy of his hire, and the plaintiff here is a corporation. And this can only have relevance, as Mr. Lamb well knows, on the assumption that all of this salary is unreasonable, and therefore should be put with the profits. It can only have relevance, as Mr. Lamb knows, on the assumption that the salaries constitute constructive dividends, which means that he would allocate zero for their labor. This is the only meaning of this ridiculous chart. As I say, it's pretty artistic. This doesn't change that fact. And it just astounds me that a man of Mr. Lamb's eminence, standing in this profession, a member of the Attorney General's committee on antitrust, would come here and insult your intelligence by giving you something like that. It's astounding to me.

So we have a situation where we have a capable man, and these folks have said so. And another thing, another one of these salaries they're complaining about is, here's Mr. Merritt Rigby, been with this company for thirty

years founder of this company, for thirty years built it into what it is. His salary is $13,000 a year, after thirty years of work. Mr. Lamb comes here and wants you, in some fashion, to deduct this from your damages, $13,000 a year. He's in semi-retirement now. These four boys working very hard, getting $11,000 a year, with a two or three thousand bonus, then they bring a local man here, Mr. Zimmerman, you remember, the accountant who is embarrassed, embarrassed because he had to tell you, on Mr. Lamb's urging, that there's something unreasonable about these wages.

Now, there is competent management here, this is conceded. Now, how do we prove these damages?

There was a man named Dr. Anderson who came here and who prepared a market share study. I told you to begin with that they had a gimmick on every exhibit they had in this case, a gimmick on everything. You are going to hear [fol. 1159] a lot of rolling overtones about 70 per cent of the market. It would be nice if they had given you a share, a market share value that was realistic and reasonable, that accorded with the fact as they themselves rule it, a share, a market share value that was realistic and reasonable, that accorded with the fact as they themselves rule it, instead of what the elliptical facts, the ones they leave out.

They give you a market share study of the area immediately surrounding the plant, the sales basically in Salt Lake City and in southern Idaho.

You remember I asked Dr. Anderson, I said, "Wouldn't it have been very easy for you to make a market share study including Colorado, which is some kind of a Morton stronghold, including Seattle, which is some kind of a Pet, Carnation and Morton stronghold, including Idaho, Montana, wouldn't it have been very easy for you to make that kind of a market share study?" And Dr. Anderson, "Of course it would" it was very easy, "but this isn't what they told me to do."

They gave him instructions to make a market share study around Utah, which shows 70 per cent of the name

brands in '58, of the branded business in 1958, around Utah.

But isn't it reasonable, and in the normal competitive situation, that a plant in Utah, where its closest competitor is out in Torrance, California, Fresno, California, Watsonville, California, Virginia, Pennsylvania, Michigan, isn't it the usual, normal situation that this plant would have a substantial portion of the business in that area? Isn't it usual and substantial that Z.C.M.I. should have the department store business in Salt Lake City, and that some department store in San Francisco should have that department store business? I mean, isn't it reasonable, and normal, the way business works, that should be the way it is?

We have zero business around the Torrance plant. Utah Pie Company has zero. So as between the Utah Pie and the defendants, they have a hundred per cent in California, have a hundred per cent in northern California. We have zero, because that's where their plants are. We are out of competition there.

Dr. Anderson had a chance to make a market study of the full area, which would have shown you something less, considerably less than 70 per cent. We don't apologize for that 70 per cent. We are prepared to take Dr. Anderson's study of that area, prepared to take 1958, as a [fol. 1160] good base, normal year as to what the situation would have been, and even that is somewhat impaired. Take 1958, figure what we have of that market. Remember we were kicked out of Denver, seriously curtailed in Washington, kicked out of Seattle and Portland, and the Spokane business. Take that for this particular market only, now, for this particular market. Because what happened as a result of this predatory price cut was that the Utah Pie Company starts out here in 1958 with the leading brand name manufacturer, and in 1961, after all the shooting is over and we get a chance to look at it in a

lawsuit, the Pet Milk Company is the leading private, not private brand, but name brand manufacturer in the area.

This is shown by Dr. Anderson's own study. This is not something shown by us. And that study was collated by Mr. Caldwell in our Exhibit 96. And that study shows that the Utah Pie Company, on everything other than private label brands—and we will come to private label brands in a moment, because that is a different and distinct market.

We start out with 37,000 dozens out of 53,000 in the entire market. This is normal, as I say, because we are right here. Nobody else is here.

And then the boys swing into action with their price discrimination, with their below-cost selling, with their little conniving, with Safeway, with their connivings on the plant, with their meeting our competition and aiming at us and not competing among themselves.

And look at the picture that develops. From 70 per cent we go down to 58 per cent, to 40 per cent, to 33 per cent. And if this complaint hadn't been filed, it would have been 20 per cent, 15 per cent, 10 per cent, and then bankruptcy, unless we sell to Pet-Ritz Company, or to the Carnation Company, or to the Morton Company. And this industry, like too many industries in the United States, would then have the characteristic of two or three large companies having it to themselves and then you would see these prices rise. Then you would see these prices rise.

This is the real meaning of what is called "investment spending."

But this is the picture that developed. You can see here the Pet Milk Company, with their Pet-Ritz and their thriving brand Swiss Miss. Swiss Miss, the lowest priced product in this market. Let them make all the price adjustments they want, but that is the fact, the lowest priced product in the market, name brand, the lowest brand commodity in the market.

[fol. 1161] Here is the Pet Milk Company, starts at 9,000 cases to our 37, and in '61 they have 51 to our 46. There goes the No. 1 position.

Do you think that is impact? Do you think that is damage? When your label, your brand name, the only thing that means anything to you in the final analysis, is taken away from you by a company whose plant is located so far remote from where you are?

This is just the localized area we are talking about. This is the injurious impact we are speaking of.

We lose each year: 11 per cent in 1959, 30 per cent in 1960, 36 per cent in 1961.

The Carnation Company, at a base period of 10/8/7, they increased 3.8 per cent in 1959; 13.64 per cent in '60, 3.8 per cent in 1961.

The Continental Company starts out with 1 per cent of the market. They aren't even here, hardly. There is an increase in 1959, 3.47 per cent, an increase in '60, 2.27 per cent, an increase in '61, 12.35 per cent. They can grow all of the Mt. Olympuses they want. Where is that other exhibit of the Morton Company, another one of these things that tends more to confuse than to truth. This is this Mt. Olympus. They had the mountains and the little area that they had. We will dig it out.

You remember that one that had the big red mountain and just a little Morton business in between.

Mr. Bertain: It is on the board.

Mr. Alioto: Never mind. They had that little business on the mountains just for the Utah area. They left out the Denver area where they knocked everybody else out with this predatory pricing, where they had a lower price in Denver than in West Virginia. They left that one off the thing. Just the Utah area.

But even in the Utah area they go from—Continental—from 1 per cent to an increase of 12 per cent in 1961. They go, in effect, 754 dozens in 1958, the time when they are only basically competing against Carnation and Pet. And you know what kind of competition there was between

those people. 754 dozens, 3,000 dozen, 3300 dozen, 18,000 dozen in 1961. And if we hadn't stopped them with that 2.55 price, they would have been up there, too, and the plaintiff would have been out of business.

[fol. 1162] So the picture of the deterioration of the plaintiff's brand, the Utah Pie label, as distinguished from the private brand, is very clear.

We take this study right from Dr. Anderson. This is the source we are using, and this is the first item of damage on this computation.

Let me explain this to you. The first one is the estimated gross profit on additional frozen fruit pies the Utah Pie Company would have sold if the 1958 market position in relation to the defendants had been maintained. And this is what it comes to.

Now, what we have done here, ladies and gentlemen, so you will understand this rather clearly: We have set out—we have done a lot of arithmetic for you, that Mr. Caldwell—incidentally, if there is a better, more intelligent accountant in the United States, I haven't seen him. I have watched this young man in these cases time after time against these bigger accounting firms from Wall Street, from New York, from Washington, D. C. They always try to confuse him, as they tried here, and every time his accounting shows up with logic and reasonableness as against the kind of accounting double-talk you heard from these other people who were supposed to know better, about the profits which result in bankruptcy, that kind of business. When Mr. Caldwell gives you a figure, it is there. It is real. What he has done for you—and this is a determination only you can make; nobody else can make it for you. If you decide that that volume we lost should have been at a 4.30 price, then the persons we lost it to are set out individually there, as you see.

Now, you wouldn't take all of these. You would just take one of these on this element of damages, just one of these.

Now, you aren't even bound by any of these figures. Let's assume that you conclude that it is something in between. Suppose you conclude it should be 4.20 or 3.80 or 3.60 or 3.50. Then these give you an opportunity to make a reasonable estimate as to what the actual dollar-and-cent volume figures are.

And what had to be done here was to go over all of these invoices and to, in effect, project a differential figure as to what the price would have been but for these violations. So you would take, on this item of damage, just one of these figures, or you could do it on the basis of taking something in between them, but this gives you a basis, a mathematical basis, to make your estimate.

[fol. 1163] So far as that 4.30 price is concerned, remember that in 1961, when they were charging 2.55 in this market, their own invoices in Los Angeles show a 4.00 price.

And all of the exhibits put in here have tended to show these prices at around $4.00.

And in the beginning, before the Utah Pie Company got into this business, in 1956-57, the price lists of the Morton Company show an increase in the prices. When they first came into business they were up to 5.16, and they increased those prices. There wasn't any investment spending at a loss then, because the plaintiff wasn't in business then. There was a price increase. There weren't any introductory offers at this time. There was a price increase in '56, and up until the end of '57, until the plaintiff gets started. And then you see this price erosion.

These other markets in West Virginia, these prices put on the Safeway contract of 2.32, this is the price they say is there, 2.32. That is a case, so you double that and you have a price of 4.64. This is where this 4.30 business comes from.

But you don't have to use this 4.30. You can say you think it is $4.00, you think it is 3.50, you think it is 3.65, you think it is 3.63. Whatever you decide upon this will

give you an estimate of the mathematics so you can make your estimate of damages.

Now, the second element here. This is the estimate based upon the testimony of the sales manager of the Utah Pie, and the Court will instruct you this is competent testimony. Sure, you are to weigh it against the fact that he has an interest, and we ask you to weigh it against that fact. But remember he can only make these estimates based on market factors, and they have all the market people in the world to come here and say its estimates are wrong if they want to, they have all the oportunity in the world to do that.

But this estimate of what he would have sold in Seattle, Spokane, and Portland areas, based upon what he actually did sell there, and the price cutting you have heard of in this case—you remember that price in Seattle, that price in Spokane, was lower than it was right at the plant down in California. You had your price discriminations operating there. You have heard the testimony of everybody that freightwise and competitivewise a plant in Utah has a better shot at this market, the Northwest market, than the plant in California.

[fol. 1164] And these are all things you have to weigh in this connection.

So here is your estimate based on that area, a separate element of volume.

Then we have it worked out on this same price here again, ladies and gentlemen. And you are not going to have to stay with these figures of 10,000, 10,000, 5,000. This division is made 40, 40, and 20 in the distribution among the defendants, because you recall the evidence that in these particular markets the Carnation Company and Continental appear to be a litte more active than the Pet Company.

You remember, as a matter of fact, that the Pet Company simply copied those price lists of the Carnation Company in this area, and these are the kind of estimates

from the relevant economic factors you are permitted to make in this type of case to arrive at what would have been the situation—this is your criteria—what would have been the situation if these people did not discriminate in prices and if they didn't sell below cost and if they hadn't combined among themselves, competing one way among themselves and another way when it comes to this plaintiff.

This is the criterion you have to get to. At best it is an estimate. It is an approximation. It is an approximation the law permits you to make because the defendants have made it impossible to get anything more exact.

But with all the evidence we have here on the prices, all the evidence we have on costs, you aren't going to have too much difficulty in finding that that volume was so.

You make the selection, 4.30, 4.10, 3.90, 3.70, or lower or higher, or in between. Or you can take it one way for one company and another way for another company. These are the estimates you have a right to make, and this is only your arithmetic.

We have exactly the same situation with respect to the Denver market. You know about the Colorado market. He goes in here at one time and sells 15,000 cases. His price in Colorado is his Salt Lake price. Remember, the plaintiff sold on an f.o.b. basis, his plant. There are one or two isolated sales, I think, they talked about that might have been different, but basically sold on an f.o.b. basis, and when he went to Colorado, he took the Salt Lake price and added freight of 20 cents. This is what the plaintiff did.

[fol. 1165] The Continental Baking Company, the Morton Company, had its Denver price at about 40, 50, or 60 cents below its California price and below its price in West Virginia—or in Virginia—but engaged in that discrimination.

Its Denver price was a price so low it was said to be below cost, as the Salt Lake price was.

You have to say to yourselves, "If there hadn't been

this price discrimination, if they had sold without the discrimination, would he have had a portion of that very important and fast developing Denver market?"

It is perfectly clear from the location of the plant. So that is your third element, your Denver situation. And this is allocated all to Morton, because Continental seemed to have some kind of a position in that market, some very strong position, and it is one of the defendants that most discriminated in price in that particular area, although the Carnation Company and the Pet Company had price discrimination in that area, as these invoices show.

Then we come to the Safeway situation. And there, ladies and gentlemen, if you believe all this evidence on the Safeway situation and you make those rational inferences that reasonable people make from the kind of conduct you saw on this witness chair and from the kind of documents you have on Safeway, and if you make the estimates under the instructions of the Court that but for this kind of conniving, but for this kind of maneuvering, the plaintiff would have had part of this Safeway business in the Intermountain area, and that is all this is. This is part of the Bel Air business, part of the Bel Air business—on the assumption that they would have had the Salt Lake City and Denver Divisions of the Safeway Stores. And this is allocated to the Pet Company because it was the Pet Company that had that. This is on a basis for the Salt Lake Division. You may conclude they would have had the Salt Lake business, but not the Denver business, or you might conclude they had the Denver business as well. And if you do conclude that, here is the arithmetic worked out for you as to what it would have come to in terms of dollars and cents, based upon the actual prices of the Safeway contract.

Ladies and gentlemen, we have a calculation for you based upon what Utah Pie would have recieved on its private label sales if its prices had been equivalent to the private label Safeway sales. If there hadn't been this

price cutting, this selling below cost by the three of them, the possibility is that those private label sales would have gone at least at the Safeway price, and this is your calculation for 7,000, 6,000, and 13 distributed among the defendants.

[fol. 1166] And finally we have the price erosion study, the additional revenue that the Utah Pie Company would have received on Utah Pie brand sales if prices had been as follows:—If there hadn't been that price erosion from 4.30 down to 2.75 as a result of this undercutting and this selling below cost, this price discrimination, and if they had maintained that price, this would have been the result.

You may conclude the prices would have been at 4.30. They are showing California prices at $4.00 in 1961, you remember, and $4.00 price in other places. The Safeway contract shows a price in Salt Lake City, the stated price, and we assume it is reasonable, as they put it out as the price to Safeway. It shows a price of 4.32. You remember that 2.16 as against 2.32 in California. We doubled that and that is your 4.32 price. So if you assume that that would have been the price but for this conduct, the mathematics is worked out for you.

Here again, ladies and gentlemen, you are free to take that, either higher, in between, or lower, and then make your estimates based upon this mathematics.

This required taking every invoice of the Utah Pie Company and working out the calculation, which is in evidence, too, supporting this, as to what the volume, what the price would have been at this basis, the amount of money, and deducting the price actually received.

It is a monumental work, but it is all here summarized for you, and you can have it.

Finally, we have a $75,000 factor for good will. I don't think there is the slightest question, if you thought in terms of value, that that $75,000 is conservative.

Had they not been interfered with in this manner, had

they been able to develop normally and naturally in that competitive area, had their volume gone, had their price not eroded, had their costs been reduced as a result of the volume had they had their Safeway share based on the merits, rather than conniving, had they had those things, they would have had a going operation, a going value to that that would have been at least 75 dollars more just on the basis of the value of that plant at that time.

Finally, ladies and gentlemen, we have summarized these things for you in this calculation here. All this is really a determination of whether you are going to take the 4.30 price, the 4.10, the 3.90, or the 3.70 price for the entire area. If you, for example, concluded the 4.10 price [fol. 1167] was the proper price under these circumstances, this figure would include for each of the defendants all of the natural consequences of the whole study. So that if, for example, you made that conclusion that 4.10 would have been the price, the individual figures for Carnation at 85,000, for Continental of 324,000, and for Pet, these would be the individual figures for the individual violations. And then on the combination or the conspiracy charge, the total amount of 649.

Now, the figures that you use on the individual violations, if you find that each one has individually violated them, don't necessarily have to add up to the figures on conspiracy or the combination. You could believe the conspiracy began a little earlier or a little later, so it does not have to necessarily add up.

But I do want you to understand this, so there won't be any confusion about it: If your verdict is in the form of saying what the damages were for the individual violation and, separately, what the damages are for the conspiracy, the plaintiff is not going to get it twice.

It may be necessary for technical legal reasons to have a different figuring of the damages on an individual basis than on a combination or collective basis, and this chart

gives them to you individually in each category and in combination, so that if your verdict should be for the plaintiff in this case and you have individual damages and a damage for the combination, the Court then will make the determination of which of those will be utilized in the judgment.

You are not going to give it to us twice by doing it that way. There could be a natural confusion about that because you put these numbers down. But you set out the individual damages based—if you find, for example, that each sold at a discriminatory price and that there is no defense of meeting competition in good faith—and certainly if there is any element of conspiracy, the good faith is immediately out the window, any element of conspiracy. If you find that they individually violated them, or one or more of them individually violated them, then you put the individual figure down.

If you find that two or more of them conspired or cooperated to bring about a low selling price in Salt Lake City, or any price stabilization in Salt Lake City that affected the plaintiff, then you will put a figure down for that, which, in a sense, overlaps. But the Court then will choose either the combination figure or the addition of the individual figures, so we aren't going to get it twice if you do it that way.

[fol. 1168] Ladies and gentlemen, I am not going to suggest or argue to you which one of these figures you ought to use. You have heard this evidence.

It would be reasonable to use the 4.30 figure, it would be reasonable to use the 4.10 figure, it would be reasonable to use the 3.90 figure, or the 3.70 figure in the light of all of these circumstances and how you view this evidence.

These estimates, this arithmetic, was put down for you, as I say, so you wouldn't have the impossible task of trying to do it yourselves in that room.

You can go slightly above it. The total claim in this action is $750,000, so it can't be above that. Or you can

go below it. You can go below that $476,000 figure if that is the way you feel about it. But you make your estimates based upon all of the relevant testimony in this case. Your determination as to whether or not volume has in fact been sacrificed, your determination as to whether or not there has been an erosion in price so that you got these vicious low prices in Salt Lake City as against these higher prices in California and in Virginia, where these people actually have their plants.

This is the informed judgment that you must bring to this determination.

Now, ladies and gentlemen, I have talked a long time and I have tried to give you these elements, to give you this evidence as I see it. I want to emphasize that nothing I have said to you is evidence. The only thing you are to predicate your judgment upon, so that the whole jury system and our notions about the jury system can be vindicated, the only thing you are to predicate that judgment on are the cold facts as you heard them from this chair, or as you perceived them in these documents, the cold facts as you analyze them, and the inferences that arise from those factors. We want no emotionalism. We want only a judgment based upon your reason and based upon justice, because I think the justice of this cause is clear. And what we are doing here is something more than just vindicating an individual lawsuit, something more than just trying to keep the Rigbys in business so that these boys can continue to have this business, so that their young wives can be in on this thing, so that their children may have a place in this business later on. There is something more involved than that, because the preservation of the independent businessman is one of the cardinal concerns of our time.

[fol. 1169] This tendency towards this tremendous concentration in economics and in business, which is going to deprive your children and your grandchildren of the opportunity to start as independent businessmen, is an issue

that overrides in importance the thing we are doing here, however important the thing we are doing here is. And it is important. This is what we are ultimately going to vindicate in this case, the right of independent businessmen to stay in business.

And America just won't be America if we ever lose that opportunity of independent small businessmen to start a business based on the merits and to compete.

This notion that we don't want competition is nonsense. Anybody was free at any time during this period of time to build a plant right in Salt Lake City, to build it in Ogden, to build it in Denver, to build it in Seattle, to build it anywhere, and compete on the merits. Or these national companies were free throughout this period of time to take their prices and put them at the same level everywhere, as low as they wanted to make them, as low as they wanted to make them, everywhere. But they weren't free, under the antitrust laws, to hold a high price one place and to use those profits to subsidize this murderous price they had in Salt Lake City.

The Rigbys aren't asking for immunity from competition. The more competition, the better. Monopoly is a kind of a fat cat, and competition is the life of commerce in this country.

These folks, on any analysis, were standing in a situation where they were kind of on the ground floor of a developing industry. All of these witnesses have told you that. All of these witnesses have told you that this was a dynamic, expanding industry. The Rigbys, with a natural position in this industry, based on 30 years in a related business, were standing to reap the harvest, the benefits, of this long and patient and hard-working apprenticeship they had put in the business, and they could have expanded, just as the bigger companies had expanded, into other places, into other territories, and have built themselves naturally.

And somewhere in Shakespeare, in one of his plays, is a phrase:

"There is a tide in the affairs of men, which taken at the flood, leads on to fortune."

The Rigbys were standing right there as a tide.

[fol. 1170] It wasn't a wave created by these defendants, as they will tell you; it was the natural economy, natural competitive economy operating, operating in their favor because they made the sacrifices over the years and they had this plant in Salt Lake, they had their roots in Salt Lake, they were able to work in this market, until the big fellows came along and dive bombed here unmercifully and kept them up, or subsidized them, from these enormous profits that we have in evidence.

These are the issues in this case, ladies and gentlemen. We have every confidence you will look at these issues and, in Matthew Arnold's eloquent phrase, "See these facts steadily and see them whole"; and if you "See them steadily and see them whole," we have every confidence that justice will return a verdict for the Rigbys to keep them in business and to compensate them for their damages and to permit the Judge the proper groundwork on which to fashion an injunction to protect them from this kind of predatory conduct in the future. We have every confidence in your reasoning and in your fairness, and with that confidence we submit this case to you.

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[fol. 1171]

ARGUMENT ON BEHALF OF CONTINENTAL BY MR. SCHAFER

Mr. Schafer: May it please the Court, ladies and gentlemen of the jury:

I should like to start by joining plaintiff's counsel by expressing my gratitude for your kind attention to this case, as it has proceeded. I know it's been difficult, I know it's been complex, and I know that sometimes it's been boring. But it has been important, it's been important to all of us.

Plaintiff's counsel and I come from different sides of the country, and I am from Washington, D. C., as you know, and he is from San Francisco, and I think we are just about that far apart on many of the issues that are in this case, and how we have assessed the evidence that's come into this trial. And I am going to start, if I may, by simply stating very briefly that I conceive some of the issues not to be, then I am going to point out to you what I conceive the real issues in the case are, and what the proof on those issues is, as you heard it and as it lies in these exhibits.

One of the issues that is not present in the case is did Morton sell at different prices and different markets during the four years in question? There is no question about it that they did. We have made that clear throughout this case, and I want you to be perfectly clear that that's not an issue you have to determine. That from time to time Morton has had different prices in the different marketing areas of the country. We've got some charts here, which I will refer to in a minute, which of course explicitly prove that.

In that connection I have never fully understood, quite frankly, why we have heard about the Fox Market invoices, for instance, where there's a $4.11 ostensible price. There's no question but there are differences in price. I don't know what the significance of that is.

Plaintiff's counsel seemed to indicate this morning that that was some confession of violation. I hope you are perfectly clear that it's not; that there's more involved to the Patman Act than simply a mere difference in price in one section of the country, in one market of the country, as against another market. And I will come more fully to that in a moment.

Another issue which I quite frankly had thought had been set to rest was, was there a $2.55 price in Salt Lake City, or was there a $2.85 price? And, was the $2.55 price an f.o.b. price down in California, or was it, in fact, a delivered price here in Salt Lake City?

[fol. 1172] I quite frankly thought that issue had been laid to rest. I thought it had been laid to rest by Mr. Degenhardt's testimony and Mr. Henzke's testimony, by Exhibit 15, which is the offer to Safeway Stores, which states the price as $2.85 delivered in Watsonville, and as $2.55 in Watsonville, California.

I thought, finally, that that issue had been laid to rest by the plaintiffs' own testimony, Mr. Gaylen Rigby, who testified, as you may recall, when I asked him, "And Morton's price was $2.85, is that correct?"

And the answer was, "$2.55 f.o.b. California.

"Question: $2.85 here; right?

"Answer: Yes, sir."

So I thought all of that together had laid the issue to rest, if you will, as to what Morton's price was that we're talking about here in Salt Lake City in June or July of 1961.

Another issue that we seemed to have been litigating, and we heard mention of this morning, was, has Morton in some way improperly acted throughout the discovery proceedings, the pretrial proceedings, in this case; have we deceived the plaintiff in some way?

And we heard this morning, in respect of the detailed exhibit that Mr. Alioto referred to, that I had told Mr. Alioto that there were no Morton profit or loss statements covering fruit pies in the Salt Lake City market. And he inferred, I thought, that there were, in fact, and that that exhibit proved it.

Well, ladies and gentlemen of the jury, you should know that in discovery, in pretrial proceedings in the case, both parties are required, when asked and when ordered by the Court, to produce documents that do exist. And if the documents exist and they are called for by the Court's order, then they are to be produced. But neither side has an obligation to do work for the other side. And that exhibit that you saw represented a great, great deal of

work, great deal of work, and we did it. We put it together ourselves. We looked at one of our receipts, we looked at all kinds of detailed information to put that exhibit together. And there is simply no requirement that we do the work for the plaintiff in that regard. We give them what documents do exist, but we don't do his work for him. And, on the other hand, he doesn't do any work for us. We do our own work in preparing for a case.

[fol. 1173] So I'm concerned, frankly, that those issues come up. I am concerned, of course, in the sense that I am personally charged with something. But that's not important here. What I am concerned with is that Morton have its fair hearing before you ladies and gentlemen, and I am sure that Morton will. But I want you—I hope that whatever your assessment of these various charges that have been made against me throughout this trial, that you will not let that hinder your fair assessment of what the evidence is in respect to the alleged violations that Morton is claimed to have performed.

Another issue, quite frankly I don't think is in the case, is where is Mr. George Vail. We have heard a great deal about George Vail in this case. George Vail is right here (indicating), right here in this book. They took his testimony in New York. And they told us before we went to trial that they were going to use some of this testimony in this trial. They have chosen not to do so. I don't know why. But here is George Vail, right here (indicating).

The issues in the case are, was there a conspiracy to injure or destroy or harm this plaintiff? And the second issue, as plaintiff's counsel has properly pointed out, is, was there an unlawful price discrimination? And those are the major issues in this case, and those are the issues I want to address myself to to you today. I hope as briefly as possible.

Now, on the conspiracy charge that Morton with one of these defendants, or with both of them—I'm not quite clear—has conspired, and gotten together, agreed to in-

jure this plaintiff, the only evidence in this record, ladies and gentlemen of the jury, the only evidence is these co-pack discussions we have heard so much about, which occurred between Carnation and Continental, Morton, one in 1957 and one in 1962, and one before the plaintiff came into the business and one after the complaint was filed. And you've heard a great deal of evidence about those co-pack discussions.

Now, I'm not going to review it in any great detail here. The net result of it was, as I know you know, that they came to nothing; that Morton was seeking to get some West Coast production facilities so it could compete more effectively in the western markets of the country; that it was looking all over for co-packing arrangements. It didn't want to build its own plant, it was too expensive. So among other people, it went to Carnation and tried to get somewhere with Carnation. But it didn't get off the ground, nothing came of that at all.

[fol. 1174] Carnation said, "Let's see your formulas." And Morton said, "Nothing doing."

And Morton said, "Let's see your plant," and Carnation said, "Nothing doing." And that was the end of it, absolutely the end of it.

Now, even assuming that there had been a co-pack arrangement worked out, even assuming that Morton was packing its pies in the Torrance plant, that by itself wouldn't harm the plaintiff at all, wouldn't have anything to do with the alleged conspiracy in this case. And that alleged conspiracy is, were they getting together to try to destroy this independent competitor in the Utah market?

Now, I am unable to see how there could be any possible connection between those two events, one event and one charge.

The theory that the plaintiff seems to articulate is that this is proof that these fellows had an opportunity to get together. And because they had an opportunity to get together, that proves, or you can find that they did get to-

gether. I submit to you that the law of conspiracy, the law of agreement or anything, is much more complex than that. And it only stands to reason that it is.

I suppose any us that has a telephone in his house can call up anybody else in the country. And I suppose in that way we have an opportunity to get together. But the law of conspiracy and the law of common sense requires more than that.

There seemed to be some suggestion that this zone map over here tended to support the proof of the charge or conspiracy, because there are these lines close together here in the middle of California. Of course, as you can easily see, all the other lines are quite far apart. And you can recall Mr. Halvarson's testimony, in which he stated that the source of those green lines that you see there are basically the State lines, plus the fact of the brokers' organization through whom Morton sells in the western areas, the Hamilton-Stone organization, which is set up basically along those green lines.

Now, I don't think that you are going to accept the mere fact that there are two lines close together in the middle of California amounts to anything at all in terms of conspiracy. That we have this chart as you may recall which shows the pricing pattern of the defendant companies in this San Francisco market that I've indicated. This is the San Francisco market (indicating), and here is your pricing. And it clearly is no possible showing there of any kind of a collusion on prices.

[fol. 1175] And so the mere fact that Watsonville is someplace near that green line up there, I don't think you can take as any possible proof or suggestion that there has been any kind of collusion in setting up those zones on that chart, or in setting the prices that are charged by the defendant companies in the San Francisco market, which is basically what W-94 is.

And I think I am fair and accurate in saying that that's all the evidence that the plaintiff has even been able to come

up with on which he relies for his proof of this alleged conspiracy between these companies, involving Morton.

I want to look for a minute at the clear evidence.

One of the pieces of contrary evidence proving that Morton is not conspiring for this business is this business about this Bel Air label. And you have heard the testimony of Mr. Kitchin, of Mr. Halvarson, and of Mr. Alan Young of Safeway, in which they all three make it perfectly clear that Morton is trying very hard to get this Bel Air business away from Pet, and that can't possibly be in any way consistent with any kind of a charge of any conspiracy to keep the business within Pet.

The suggestion is made, as you have heard it, that this is soft competition and it is not aggressive competition. But that simply doesn't comply with the facts as the facts have been expressed to you by those three gentlemen. And, of course, it is not necessary to remind you that Mr. Alan Young is completely separate from all these organizations and has no reason to tell you people anything but the truth.

Now, in connection, again, with the positive proof we have shown you ladies and gentlemen that there was no conspiracy as has been charged are these price charts. I have just shown you one. Here are these bigger ones of the Salt Lake City market.

Now, I submit to you that if you are going to have a conspiracy, probably about the first thing you would do is to agree upon your prices. And I submit to you further that you can't possibly see any kind of a pattern of agreement on prices on these charts in the Salt Lake City market. This is 1960, and here is 1961. And they show great dissimilarity in price, both in price movement and in the level of pricing.

[fol. 1176] Here is Pet-Ritz staying up here. Morton is all over the place. Carnation moves when nobody else moves. They all have different levels of prices.

All of these small charts again prove that in all the markets of the West the same picture is shown of great

dissimilarity in price, of price levels, and of price movements, the chronology of price movements.

I hope you will study these charts very carefully when you retire to consider this case.

Again, in connection with the positive proof, ladies and gentlemen, that we have had no conspiracy in these markets in these years we are talking about is the testimony of Mr. Halvarson, where he described to you in great detail the difficulties and the competitors and the competitive situation in the various Western markets. And you will recall he identified who those competitors were and how he has to price according to the competitive conditions in every single one of those different markets in which he competes out of his Los Angeles office.

And in that connection the plaintiff's counsel has made a great deal of this testimony of Mr. Halvarson's, that he had never changed his price in the Salt Lake market in order to meet a Pet or a Simple Simon price.

And Mr. Halvarson further testified, as you may recall, when he was on the stand here, that the reason he never did that was that the Pet and the Simple Simon prices simply are not low enough. There is no point in setting a price to meet that price or in setting a price to meet that price. What you have got to do is set a price to meet this price or this price or this price. And that is why that testimony came forward as it did on the deposition. There simply is no reason, as Mr. Halvarson made it perfectly clear, that in this market where Pet and Simple Simon had not been the low-priced brands in the market, for them to try to meet those prices. You don't get any sales at those prices.

In other markets, however, in Los Angeles, and in San Francisco and Seattle, Mr. Halvarson made it perfectly clear to you that he does set prices to meet the Pet prices and the Simple Simon prices in all of those markets.

[fol. 1177] And that, as I see it, ladies and gentlemen of the jury, is all the evidence we have on this matter of a conspiracy, was there a conspiracy.

The plaintiff suggests there was a conspiracy, or could have been one, because they had these co-packing conversations. And I suggest to you that you cannot look at these charts and you cannot hear this testimony and come away with anything but a conclusion that these three companies are vigorously competing in every single one of the markets of the West.

Now, in particular, turning now to the price discrimination, this charge which you have been told is a separate and a different charge than the conspiracy charge, and of course it is. It is the charge, quite frankly, that I think should require most of your consideration in this case. I don't think there is a thing to this conspiracy business. I want you to consider very carefully, though, the proof and the issues in respect to this price discrimination charge and, as I told you, there is no question in anybody's mind that Morton has had different prices in different marketing areas.

What is crucial to a determination, however, of whether or not these different prices in these different markets amount to a violation of law is not simply the matter of the difference in price. What is important is that you find that because of this difference in price there has been what the law calls a substantial lessening of competition in the market, and this is a big issue and an important issue, and it takes a lot of facts to determine it.

In connection with the proof that is required of whether or not there has been a substantial lessening of competition, what I want to do is point out to you that the plaintiff has not made any effort even to prove this matter of a substantial lessening of competition in the market place. And what that concept means, ladies and gentlemen, is: Has competition been diminished in any measurable way? Can you see any adverse effects in the long run among sellers in the market place? And we are talking here about Salt Lake City, and we are not talking about mere sporadic shifts of business between different competitors,

and we are not talking about whether one fellow has to sell at a little less price for awhile than he used to sell at. We are talking about more substantial, far-reaching, long-range effects than those mere shifts of business or changes in price. And the plaintiff, as I say, hasn't come to you with any evidence that there has been any kind of a competitive effect, such as is required under the Patman Act. [fol. 1178] Who brought in the witnesses from the market place to speak to you ladies and gentlemen about what the facts are in the market? Why, it was Morton that did that. We asked Elmer Degenhardt to come in here, and we asked Leonard Henzke to come in here, and, with Pet, we asked Mr. Alan Young to come in here, and we asked Mr. Doil Smith of Denver to come in here. And those people were people who were competent to tell you about the market and who competes in it and whether competition has lessened and, if it has lessened, was it lessened because of Morton.

And the plaintiff made no effort on that score at all, absolutely none. The plaintiff was content to put its own people on the stand and to have them say they had lost business here and there and elsewhere, but that is not enough. You have a much more important, more socially important, thing to consider in determining the merits of this lawsuit.

Now, the proof that Morton put on in this regard was all consistent. It was proof that competition has been increasing, it is intense, there are many numbers of brands in all of these markets, that people are all over the place on price, that you move on price on a two or three weeks spot basis, and people are coming in here all the time with new brands and with new prices, and that competition is highly vigorous in this industry in every single market in which you are competing, and that goes as well for the Salt Lake City market.

There are many brands in the Salt Lake City market. You have had them all named to you. You have had the

various methods of competition described to you by Mr. Degenhardt and Mr. Henzke, among others.

Now, in connection with the charge against Morton respecting this matter of a price discrimination violation, the only thing, the only thing the plaintiff complains about in respect of Morton is this one price in June or July of 1961, and that is really all he can complain about.

You may recall when he was on the stand and we were talking, and I asked him whether or not any of those sales by Morton had caused this erosion of price that he complained about, he was unable to identify anyone except the one in June and July of 1961. All the rest were piddling little sales that didn't bother him at all, and Morton has never, never, in the plaintiff's own admission, come into this market with a price that the plaintiff complained about except that one, two or three week price in 1961, in June or July of 1961.

[fol. 1179] Look at the pattern of Morton's other sales in the market. How could he complain about an erosion in price. Look at the sales. They are sporadic sales. I am comparing this chart now with that chart, and you can see the volume generated by these sporadic sales.

Look at them. It is almost ridiculous. Look at the volume. It is almost ridiculous. Here are some sales up here in the earlier years, and look at the volume on the chart. And here are some more.

And then we change the size of pie from 24 to 22 ounces, and we come down here, and the price in the middle of 1960 is here. And then at the very end of 1960 the prices are in here. But none of these sales, as you may recall, were sales in the Salt Lake City market. They were sales up in Pocatello and Boise and Idaho Falls, and Morton simply could not get into the Salt Lake market with any of these prices.

And so finally in June of 1961 it set this price delivered in Salt Lake City of 2.85 and f.o.b. California down here.

And this was the first time that Morton had been able to make a sale in the Salt Lake market since this sale here

in something like May of 1960. That sale, as you may recall, ladies and gentlemen, was a price lasting for something like two or three weeks, and Morton got one sale in the market, sold Safeway Stores. It was able to sell Safeway and that is where the volume came in June and July of 1961, one sale.

Mr. Henzke was on the stand, and he testified that lasted with the Safeway organization for something like three weeks. So what we are talking about, in terms of a price discrimination by Morton in the Salt Lake market, that the plaintiff complains about, is one price quoted in June of 1961 that had the effect of selling one customer in the Salt Lake market, which had the effect of tying up that customer's warehouse for three weeks and three weeks only. And that is what this case comes down to.

And then there have been charges against Morton in the Denver market. And, again, we have not had the benefit of any proof from any of the plaintiff's witnesses about anything to do with the Denver market. All you are given in respect to the Denver market is the plaintiff's own estimate that he lost some thousands of cases of sales in the Denver market, and that is all you are given, absolutely all. You have a few invoices about Morton's prices in Denver. You can't tell from the evidence whether Mr. Smith is correct in saying that Morton had a price at a [fol. 1180] level competitive with everybody else in the Denver market or not. You don't know a thing about Denver except the plaintiff's own estimate. You just know that in 1961 he lost sales of thousands of cases in Denver.

And I might add that his estimates for losing sales in Denver of eight months in 1961 is a total greater than his entire sales in the Salt Lake City market, where he has a virtual monopoly.

Plaintiff's counsel this morning was content to, in effect, testify that Morton seemed to have some position in the Denver market. But there has been no proof that you were given at any kind of a position in the Denver market.

And Morton is just one of a number of brands competing in the Denver market.

And you may recall Mr. Doil Smith's testimony as to the number of brands. And you recall Doil Smith's testimony that he was the person who purchased the Frost 'N' Flame brand back in November of 1959. And he said he purchased the Frost 'N' Flame brand from the plaintiff company because it came in with a very good price, the witness said, Mr. Doil Smith, and it was the lowest price Denver had ever had. Mr. Smith said they had never had 3-for-a-dollar pumpkin and mince pies in Denver before.

And then when he was asked, "Why didn't you buy from the plaintiff again in 1960?" Mr. Smith said, "By then the market had gotten more competitive. There were about 12 brands in the market in 1960, and that is why I didn't buy from the plaintiff in 1960."

It wasn't because Morton had done something in the Denver market. Morton was in the Denver market competing, but that was all it was doing. It was competing with about ten or twelve different brands in the Denver market. And the reason the plaintiff couldn't repeat its sales in the Denver market was this general level of competitive activity.

In connection with the invoices that the plaintiff has offered on this Denver market, I again confess to some perplexity.

We have invoices to show that Morton had sales of about $3.44 or $3.65 in Denver.

And I asked Mr. Gaylen Rigby on the stand, "Well, if that was the Morton price, you could sell in that market at a profit, couldn't you?"

[fol. 1181] And he said yes, he could. You may recall that your add the 2.88 price he was selling at to his freight-charges, and he can go over to Denver and sell, he can sell at less than Morton is selling at. So if the plaintiff is excluded from the Denver market, it is not because Morton has too low a price. The fact of the matter is that we

have no indication at all that the plaintiff has made any real efforts in the Denver market. He hasn't any salesmen over there. He goes over there once in awhile, but his brand isn't well-known, his brand name isn't, according to Doil Smith. And Mr. Smith again said that the plaintiff's quality isn't known.

And he is the fellow who once in awhile drives over there and tries to sell some pies. You have got to do more than that. You have got to do it every day. The competitors are over there competing every day. And Morton is competing with those competitors every single day. And you need more than just occasional spot charge driving over there in your car.

And you may recall that Mr. Smith, when I asked him, said explicitly that in 1960 it wasn't Morton's price that caused him not to buy the plaintiff's product. It was the whole general level of competitive activities, and that is according to Mr. Doil Smith's testimony.

In respect to the Seattle and Spokane and Portland markets, you again have nothing to go on. You don't know what the situation is. The plaintiff says he has lost sales in Seattle and Portland. And his only testimony of any efforts is that he got in a car and drove around with his broker for two weeks and tried to sell some pies up there.

And again I asked him, "If the Morton prices were such as shown on these invoices, you could have sold up there at a profit at those Morton prices, couldn't you?"

And he said, yes, he could.

So, again, I don't see how it could possibly be said that Morton's prices kept the plaintiff out of Seattle or out of Portland or out of Spokane, and particularly with respect to Spokane, it is clear the plaintiff has not been kept out of Spokane. He has very substantial business in Spokane. He has the Sonny Boy label, which you heard our testimony about.

Now, he introduced the label in Spokane just the same way he is complaining about here with respect to Morton.

He had a price here in the Salt Lake City market in 1960 of about $3.70 and, in order to make sales in Spokane, [fol. 1182] what did he do? He quoted an f.o.b. Salt Lake City price of 2.88, almost a dollar less than his regular going price. And it seems to me that is exactly what he is complaining of in respect to Morton. He is complaining that Morton had one price in California and a lower f.o.b. price for shipment to Salt Lake City. And that is exactly what he did in Spokane. And that is a perfectly proper business thing to do. If you have to sell at that price in that market, that is the price you sell at.

I might say, however, that with respect to Spokane you should be aware that there is a great deal of difference between these long-term arrangements for private label where Mr. Rigby, for instance, says, "I will sell you private label for a long time at a certain price, at a low price," and the situation in respect to Morton, where Morton comes into this market and says, "For two weeks you have a certain price, and that is all, and for two weeks we are going to try to introduce our product into the Salt Lake market, and we are going to make the sales we can in two weeks, and then we are going to quit, and maybe we will come back."

But the plaintiff says in Spokane, "Here is my price for a long period of time. I want your business on the Sonny Boy label, and I will sell it to you for a good low price."

There is a great deal of difference in the opportunity left to the competitors between those two situations in those two different markets.

Now, I want to speak to you briefly about this incident involving Mr. Chapman, who is Morton's broker, and Mr. Gaylen Rigby.

You are, of course, asked to believe that because of this incident that Morton had some predatory or anticompetitive intent to destroy the plaintiff. I want you to consider, if you will, very carefully what the facts are in regard to that incident.

Now, it is agreed by everybody, including Mr. Rigby himself, that that dispute on the telephone that you recall, involving the brokerage arrangement with the Utah Pie Company, occurred in the first week of October of 1960. And it is clear on the testimony and on the exhibits, I submit, that Morton, through Mr. Halvarson, heard about Mr. Chapman's availability as a broker through some independent party down in Los Angeles in the middle of October, and when Mr. Halvarson heard about Mr. Chapman, he called Mr. Chapman up and he said, "What do you think about being a broker for Morton up there?" [fol. 1183] And Mr. Chapman said, "I don't really know. You haven't got much of a position in this market. Nobody has ever heard of your name for a long time." Mr. Halvarson said, "Let me come up and talk to you about it."

He came up in the middle of October and they talked in the Continental Baking bakery here in town, in Salt Lake City.

As a result of that conversation, in the middle of October Mr. Halvarson went back to Redwood City and contacted his own officers and got approval for Mr. Chapman to be the broker for Morton up here in Salt Lake City. And all of this occurred considerably after this alleged dispute, or whatever you want to call it, between Gaylen Rigby and Stanley Chapman.

So that I don't think, and there is no evidence, absolutely none—and Mr. Halvarson and everybody else has contradicted it, Mr. Chapman has contradicted it—that Morton ever knew about this dispute until this lawsuit started. And Morton only found out about it, through Mr. Halvarson, only found out about Chapman's brokerage arrangement with the Utah Pie Company considerably after this October meeting.

And I don't think that on those facts, when you consider them and when you consider the chronology of facts, you will see any kind of a connection between Mr. Chapman

at the time he was mad at Mr. Rigby and the Morton Company. And you also have to consider this: Was Mr. Chapman really mad in the way that is alleged by the plaintiff? Was he really intending to go out and get another pie company and run the plaintiff company out of business? It sounds to me absurd at the outset. You've got to consider these facts, that Mr. Chapman became Morton's broker in 1960, and it wasn't until eight months later that this price was quoted, which is the only price the plaintiff complains about, in July or June of 1960. And you are asked, I suppose, to believe that Mr. Chapman harbored a grudge for eight solid months and tried all kinds of intermediate price concessions that were totally ineffective to get any sales in Salt Lake City, and finally, in eight months, he let his pent up anger run away with him and got Morton to quote a ridiculously low price, as is charged, in order to get the Utah Pie Company.

I don't think that makes any sense at all, none at all.

And you have also got to consider that Chapman and Morton, working together, set a low price only on one product, apple pies, that the plaintiff makes. On all the other flavors they didn't sell at a low price.

[fol. 1184] Now, if you wanted to run the plaintiff company out of business, wouldn't you have done more than that? Wouldn't you have set a low price on boysenberry and cherry and peach pies and pumpkin and mince pies, if you really were interding to run the Utah Pie Company out of business?

The whole charge, ladies and gentlemen of the jury, strikes me as totally absurd on the facts.

You should also consider in that connection that the testimony is that Mr. Chapman didn't start running around trying to get another pie account from somebody else, that he just didn't do a thing. He got mad on the telephone for twenty minutes, and then forgot about it. And Halvarson called him up and said, "Are you available?"

But Chapman didn't go to Halvarson and say, "I have got to have a pie account so I can get the Utah Pie Company."

Halvarson happened to hear about him and called him up and asked him if he would be interested in having the Morton line. And Chapman, as he says, was reluctant at first.

You should also consider the testimony that when they quoted that 2.85 price in Salt Lake City to Safeway Stores and to American Food Stores in Ogden, among others, and they heard that the plaintiff company had reduced its price to 2.75, they didn't lower the price again to get any sales away from the plaintiff company. They said, "We can't meet that. We can't go any lower. $2.85 is our lowest price."

They didn't chase the plaintiff down in order to drive him out of business.

And they called—Safeway canceled its order because it had a better price from the Utah Pie Company—or, I should say, more accurately, Halvarson canceled the order because Safeway tried to back out of the order. You may recall that testimony from Mr. Halvarson and Mr. Chapman. And they also contacted Mr. Degenhardt, and Mr. Degenhardt testified he was given an opportunity to cancel out his purchases from Morton because he had been offered a better price from the Utah Pie Company.

Now, if you are really trying to "get the guy," if you are trying to run him out of business, is that the kind of behavior you engage in? Do you call up your buyers with whom you have orders and say, "You can get out of my deal. I understand you have a better one with the Utah Pie Company."

[fol. 1185] You don't do that if you are trying to run him out of business. That is not the kind of thing you do.

And then there is a lot of talk about sales below cost by Morton. You have got to reflect on this, that Morton has never budgeted or planned any sales below cost. You

have also got to consider that Morton has made money in 1961. And you should also consider this, that in the Salt Lake City market Morton has made money in every single one of the four years involved in this lawsuit.

Now, the plaintiff contends that doesn't mean anything, that that is not profit after allocation of every kind of expense that you can think of. And Morton says it does mean a lot. It means we are making money in Salt Lake City market, and we are helping to carry the rest of the organization.

And the material, ladies and gentlemen of the jury, respecting this matter of sales below cost, is really relevant only to what kind of an intent did Morton have in selling in this market? What were they trying to do? Was there something predatory or anticompetitive or in some way wrongful in trying to sell in this market? And if they were selling way below cost with no hope of recompense, it may be that you could say, "Well, that doesn't sound to me like normal business behavior."

But here you have a situation where Morton is making money on every single year. It is not making very much, but it is making some money. And in the process of these four years, what is it doing? It is keeping its name before the public. It has some Morton sales in here. It has contacts with the buyers. It has a sales representative. It is hanging on. It is doing the best it can. It is hoping it can develop a market in the future, and it is doing all this and still making some money.

There is no way for anybody to say that that is such peculiar behavior that you could say that Morton must have been intending to do something evil by doing this kind of thing, by selling at this level of profit, whatever the exhibit shows.

This is perfectly normal business behavior and the kind of behavior that is endorsed and not condemned by the antitrust laws, that corporations are induced to expand, to create new competition in various markets of the

country, and that is exactly what has been going on here in Salt Lake City.

[fol. 1186] This morning we heard that there was something wrong in Mr. Herman Taylor's testimony. You may recall Herman Taylor is the fellow who came up and said he had done an audit or an accounting study of the Watsonville operation in California, and it was suggested to you that the only way Mr. Taylor was able to show any kind of a profit in Watsonville was that he had made up some claim for damaged boxes. And in that connection the plaintiff's counsel continually laughed at Morton's production rate. He doesn't believe Morton can make pies 120 a minute.

But the fact of the matter is that Morton does make pies at 120 a minute, and the fact of the matter is there were boxes damaged. And the fact of the matter is that the boxes damaged were about $5,000 worth of boxes damaged in Watsonville. And that is why he showed a thousand-dollar loss in Watsonville, and but for the damaged boxes Watsonville was making money all through 1961. And the contract has never been changed from 1961. And Morton simply is not driving Watsonville into the ground. They have the same contract they have always had. And the documents in the record show that the Watsonville people themselves computed that they were making 15 cents a dozen on their business with the Morton Company under that packing arrangement.

You were given in the record, ladies and gentlemen, an exhibit made up by Mr. Caldwell which purports to show that if Morton had sold at these prices through all these years, they would have lost an awful lot of money. That study was done, in my view, very badly. You may recall that it used Carnation's costs, and it put in a lot of costs that Morton never had, and got terribly high numbers of losses.

But the important thing is: What, in fact, happened? And, in connection with what, in fact, happened, we did

prepare—this is the exhibit I was talking about just a moment ago—this detailed exhibit showing every single sale made by the Morton Company in Salt Lake City through the four years in question. And we got every kind of expense you can allocate against that, and you come up with the profits we were talking about earlier.

And this is what is really important: What did Morton do? Not this hypothetical study about what might have happened under some kind of blotched up figures taken from some other corporation's records.

So in conclusion of this Patman Act charge, I want to express to you that what's important in the Salt Lake market, or in the Denver market, or in the Seattle market, or in the Spokane market, or any of these other markets, [fol. 1187] is not did Morton have a different price in one market as against another market; that's not the issue at all. There's no question that from time to time they did. But what is important is, has there been an adverse effect upon competition in these markets? Has competition diminished in some way? Has Morton taken over the market in some way? And that's what you've got to determine. And all of the evidence in the record points to the fact that Morton has not had these effects, and that these price differences have not had these effects that the law requires you to find before you can find that there's been any violation of the Robinson-Patman Act.

Now, even if you should find that there has been such a violation, even if you should find that there have been those price differences, which amounted to what the law calls a substantial lessening of competition, you've got then to consider Morton's defense that in pricing this one price that the plaintiff complains about, in June of 1961, is, was Morton meeting the competition created in the market place? And Morton, of course, insisted that it was, and we have brought in proof for you in that regard.

It's only a peculiarity of the case that the price that Morton was meeting happens to have been the plaintiff's

own price. It could have been any price. But in part, Morton was meeting the plaintiff's price. But it's entitled under the law, to meet any lower price. Why, the lowest price happened to be the plaintiff's price, and this is the price we are talking about. All the issue in that regard is, was Morton's price, in 1961, a price made in good faith to meet an equally low price of a competitor, in this event the plaintiff? And we have suggested to you, through the testimony of Mr. Henzke and Mr. Degenhardt, of Mr. Chapman and of Mr. Halvarson, of Mr. Alan Young and all the rest of them, that what's important is what is the price in terms of the size of the pie? And if you come out at about the same on an ounce basis, isn't that the price you have to quote in order to get into the market?

Now, as we have shown you, Morton tried from the advent of Mr. Chapman, in the very end of October of 1960, up until June of 1961, Morton tried to make sales in Salt Lake City, and they tried at various prices, none of which got them as far as the $3.10 price of the plaintiff. And Morton made no sales whatever. And finally they conclude, in June of 1960, that in order to make any sales in the Salt Lake market, what they've got to do is price the pie at an equivalent price to the $3.10 pie that's being quoted by the plaintiff company. And that pie is all over [fol. 1188] the market. It's in Grand Central Stores, and it's in AG Stores. And the testimony of all these retailers is that unless you gave them a price that permits them to quote a price at retail, the same as the other fellows have, then they won't buy your pies. So in order to get into this market, Morton had to have what in effect was a $3.10 price.

Now, when you compute all the difference in sizes between Morton's pie and the plaintiff's pie, you come up with an equivalent price when it's at $2.85. And Morton at $2.85 is exactly the same thing as the plaintiff is at $3.10, Morton's at 22-ounces and the plaintiffs' at 24-ounces. And it was because of the plaintiffs' weight ad-

vantage, plus the fact that the plaintiff had all of these delivery advantages that you've heard about, and the plaintiff's brand was well known, and Morton's brand wasn't well known, and the fact that the plaintiff could make quick deliveries, and there were all of these other considerations that go into this consideration of what price you have to quote, but Morton came into the market at a $2.85 price. And this was a price, I submit to you, that was made in good faith, in good faith to meet the price that was prevailing in the market, which happened to be the plaintiff's price.

And Mr. Degenhardt's testimony, and Mr. Henzke's testimony, are peculiarly important in this regard, because they're disinterested witnesses, and they both came here and sat in that chair and they told you that in their judgment, as professional buyers, Morton simply had to price the pie at a price lower than the plaintiff's $3.10 pie. And if Morton didn't do that, then Morton wouldn't get any sales. And Morton's entitled to have some sales here. And in order to get in that market, Morton had to come in then at $2.85. And Mr. Degenhardt's testimony was that the $2.85 price was approximately the same value as the $3.10 pie, and it was really close in terms of being equally low. And that's in his testimony.

Now, moreover, this price of $2.85 here in Salt Lake City was not at all peculiar to Morton. Morton had had that price in Los Angeles for quite some time. And these charts, as you may recall, we showed you these charts, that they compared Morton's prices in Los Angeles as against prices in Salt Lake City. And you can see here the pattern of the price differences, and the lower prices in Los Angeles as against the higher prices from time to time in Los Angeles. And you recall that this straight line is the Salt Lake City price.

[fol. 1189] And in that connection, you'll see that in June 19 of 1961, the price in Los Angeles was exactly the same as the price in Salt Lake City. Nothing peculiar

about this $2.85 price. This is the price Morton was able to quote in a lot of markets. And here's another one here (indicating). And here the Los Angeles price goes lower than the Morton price in Salt Lake City. And again here, and again here (indicating). And only here, way back in March, or I guess its April, the price in Los Angeles is higher, but never through these months in which the plaintiff is complaining that Morton unlawfully discriminated in price as against the Salt Lake City market.

And the same picture, briefly, is shown in respect to the San Francisco market, the market that's closest to the Watsonville producing plant.

And here again you'll see where Morton's pies was the same as the Salt Lake City price, and where the San Francisco price was lower than the Salt Lake City price, and occasionally where the San Francisco price is higher than the Salt Lake City price. But there's nothing unusual about this price, that the plaintiff complains so vehemently in June of 1961.

Now, I want to turn now to this question, ladies and gentlemen, of, has Morton eroded the prices in Salt Lake City through the five years in question here? And you look at that chart, and you look at that volume chart. And it's been claimed that Morton has helped, in agreement with these other companies or all by itself, to drive the price down from this level, whatever it was here, of the plaintiff, down to this level here (indicating). Now, how can Morton, with these volumes, and at these prices, have had anything to do with eroding the price structure in Salt Lake City?

Now, if you review those advertisements, retail advertisements that we had so much testimony about in this record, that were introduced by the pack, you will see that the effect of all this has been you've moved the price down at retail from something like 49 cents a pie down to about 27 cents a pie. But Morton hasn't done this, they wouldn't do it. Not at these prices, they couldn't do it.

Morton is just in here as a small concern, trying to compete and getting some business at the going competitive level. And probably whatever erosion of price there has been, has been the result mostly of what the plaintiff has done. He came in in 1960 with this low price on this private label pie, at $3.00 in the Salt Lake market, to the biggest buyer in the Salt Lake market, the AG Stores. And this is probably—I don't know, but this is probably what, in fact, eroded the entire price structure in the Salt [fol. 1190] Lake market. Because after that nobody from out of the market could come in and compete in the Salt Lake market except at a price of $3.00 or $3.10, or the equivalent. The plaintiff company chose to set by itself, without help from anybody else in the Salt Lake market, by pricing to the AG Stores at that price of $3.00.

Now, in connection, ladies and gentlemen, with the situation involving the private label pies in the Salt Lake market, starting in 1960, where the plaintiff had a price of $3.70 on its regular brand pie, and came in at $3.00 or $3.10 on its private label pies, Morton, when this case started back in September of 1961, asserted what the law calls a counterclaim. And the effect, the purpose and effect of that counterclaim was to allege that because of these discriminations, Morton had not been able to sell in this market, because the market had become a very low-price market and Morton Company couldn't get into the market at that time. And you can see from the volume of the exhibits there shown that Morton couldn't get into the market at these prices. And Morton asserted in that counterclaim that that private label had precluded Morton from getting in the market; and when it could get in it had to get in at a very low price. So you will be asked to consider that counterclaim when you take this case with you to the jury room.

Now, in that counterclaim, however, I want you to be perfectly clear, ladies and gentlemen of the jury, that Morton is not asking for any money. Morton doesn't com-

pete that way. But Morton does insist that particularly this plaintiff, which has a dominant share of this market, has to compete fairly with all of its competitors in the market; it's got to sell at the same price to all the customers. And that's what the Robinson-Patman Act requires, and that's what the Robinson-Patman Act was originally intended to do, was to require that two customers which compete with each other, get the same price. It was only very much later that the Patman Act was broadened to cover the situation of a territorial price discrimination, as between, say, the Los Angeles market and the Salt Lake City market.

But Morton is entitled, and everybody is entitled to face a competitor who charges the same prices to everybody. And that's all we want in this case.

Now, since this complaint's been filed, and since this counterclaim's been filed, the plaintiff has, in fact, been charging the same price to everybody. It's an extraordinarily low price. It's a price of $2.90. But it's the same price to everybody. And whether this counterclaim had [fol. 1191] an effect upon that, I don't know. But it's important to all competitors, who seek to sell their pies in this market, that we are all equally confronted with fair competition, with competition which quotes the same price to all competing customers within the market.

But Morton doesn't want any money out of this. It just wants an adjudication that the plaintiff is required to abide by the Patman Act, just as Morton is required to abide by the Patman Act.

Now, in my view of this case, these charts help show, in my view of this, they show, as you may recall them, they show the declining costs that Morton has been able to achieve in producing its pies and distributing them, getting them to the Salt Lake City market. And that's why you've got this increase in competition through all the industry, and in Salt Lake City. And Morton's been able to achieve this through hard work, and through diligence.

And it's the kind of thing that's encouraged, of course, by antitrust laws, and not condemned by the antitrust laws. And that's why you've got lowering prices, an erosion of prices, in various markets of the country. And it's the story of hard work.

Originally the plaintiff seemed to recoil at this competition; it was afraid of it. And when it was first confronted with this kind of competition in 1961, practically the first thing it did was file a suit; just about the first thing it did was file this action. But since then, the plaintiff, it seems to me, has perhaps learned a lesson. The plaintiff is now selling at an equivalent price to everybody, and is selling a great, great volume, much higher volume than it's ever sold before. It's got a lower price than it's had before, and it is making more money on more pies. And I think it's probably becoming a stronger competitive factor. And I think this is good, this is a benefit, and I think they may have learned something by this. And they've got tremendous volume, they've got almost this entire market. Now, I think that in order to get into other markets, this case may have a beneficial effect. I think this plaintiff company is probably a good company. They're young fellows who run it now, but they are learning, and they are getting more volume than they have ever had before. And when they increase their efficiency, and what have you, they will be able to expand in other markets. They hold the Salt Lake City market now. But they will get into these other markets. I think this case, and this increasing competition, evidenced by these declining costs that other companies are getting, is going to have a beneficial effect. The plaintiff is a strong, young company, and it's going to benefit them in this, and I think it's going [fol. 1192] to expand and grow. But I don't think it's going to do it by filing lawsuits. But what it's got to do is increase its sales efforts, increase its production efforts, put representatives in these other cities that it wants to sell in. You can't do it on a one-shot basis. But the plaintiff,

when it does all these things, when it increases and makes up a sales force, and increases its production efficiency, is going to be a strong company in this regional market. And this is but the cause and the effect of the competition that we have been experiencing. We've got declining prices, there's no question about it. We've got lower retail prices now than we had in 1958, and we've got lower manufacturing prices than we had in 1958. But this isn't bad; this is good. This is competition. This is the effect of competition. And it's also the cause, it seems to me, of the palintiff's increasing efficiencies and increasing competitive vigor, that the plaintiff is getting bigger all the time, it's selling more pies all the time, and it's learning through this process. It, as I say, is becoming a much stronger competitive factor.

Now, I think this case is extraordinarily important. What we are testing here is whether or not a corporation, which doesn't happen to be locally based here in Salt Lake City, or in any other market of the country, can come in here and sell its product. Maybe you don't like its product, but that doesn't really make any difference. Does it have a right to come in here and sell? And this is extraordinarily important to the industry, because, as you have heard, this industry is one composed of lots of little marketing areas—not little, but separate, independent marketing areas, San Francisco and Los Angeles, and Denver and Salt Lake City, and all of the rest of them.

And nobody can sell on those markets at the same price. It's simply impossible. They are all different brands in those markets, and different competitive activity, different buyers, etc. And you can't sell at the same price. And it won't do for the plaintiff's counsel to say it's okay if Morton sells at $2.85 in this market as long as it sells every place in the country at $2.85. It just won't do to say that. And what we are testing here, it seems to me, is something terribly important. And that is, can these companies come in here and compete in the Salt Lake market, come in and compete at a price basically set by

the plaintiff's company themselves, and can it do this and not have to stand suit for having come in here and trying to develop some sales from some 700 dozens back to the sum of 12,000 dozens in a year, and increasing its market share from something like one per cent to eight per cent.

[fol. 1193] There is no reason why a company shouldn't be allowed to do that. And I think that your consideration in this case is really vitally important to this entire industry. And I am sure that when you consider the facts of this case, plus the larger issues that are involved, in whether these companies can compete in these various local marketing areas, I am sure you will conclude that there ought to be a judgment for Morton in this action.

ARGUMENT ON BEHALF OF PET BY MR. LAMB

Mr. Lamb: May it please the Court, ladies and gentlemen of the jury:

In my entire 30 years of law practice, I have never had one of my witnesses accused of being a liar. Three of my witnesses were accused by the opposition of being a liar—the head buyer for the Safeway Stores, the president of the Milk Products Division of Pet Milk Company, Mr. Dittman, chief contract officer for the Pet Milk Company—who sat on this witness stand and were brought here by me as my witnesses.

Ladies and gentlemen, you observed the demeanor of these people, and I ask you to be the judge as to whether they told a lie or they didn't tell a lie.

I brought Mr. Alan Young here, the chief buyer for the Safeway Stores, so that you could get the truth. He sat on that witness stand and told you that he never offered a fruit contract to Mr. Gaylen Rigby. He told you that he did not tell Mr. Gaylen Rigby to go out and buy apple.

Ladies and gentlemen of the jury, the innuendo, the distortions that have taken place in this courtroom today, by a master of cliche—the low leg and the high leg, what is

that? Is that in the antitrust laws? Interstate treasuries, is that in the antitrust laws?

Those expressions are used to inflame you against the defendants in this case. They are not based upon fact. They are slogans to try to poison your minds against these defendants. There were 32 of those cliches used during the course of the argument of my opponent.

Ladies and gentlemen, it saddens my heart to have my opponent say that these boys didn't earn the money that they're being paid. I think they're to be congratulated for earning the amount of money that they are being paid. But they brought a lawsuit against me, claiming that I injured them. And I want to say to you, I've got three boys—one is 26, one 25, one 21—and they're working 55 and 60 hours a week and they're not making $11,000. They are making a lot less than that.

[fol. 1194] This is not said to you to malign these men. It is said to you to realize that they're not being injured. When you bring a lawsuit like this, and you ask for six and seven hundred thousand dollars, based on so-called injury, you've got to show us where you were injured; we've got to know where you start from.

When I had this chart made, that Mr. Alioto showed you this morning, in a small family corporation it's not just the income of the corporation, but it's what did the people get in the way of their salaries? I don't deny that these people work hard. I'm sure they do. They are the kind of folks that I'm sure they're very loyal in their work. But the question is, did they get hurt.

Now, they didn't get into the frozen pie business until 1957. They sold a little bit that year. They were in the red. They were in the red in the fresh pie business, and they got in the frozen pie business and started making money. And they continued to make money in the corporation, and look what nice salaries they got by the end of 1961. It shows that they're a successful operation.

Now, I say to you ladies and gentlemen of the jury, if

those bars were going that way (indicating), and they were going down, that would tell you a story of an injured company. But that bar is going up.

Ladies and gentlemen of the jury, at the close of Mr. Alioto's statement, he went into some of the most interesting calculations on damages that I have ever seen in an antitrust case. His accountant has made out a study, has made up a study to show damages. And he used 1958 as the year in that. That was the first year that the Utah Pie Company got into the frozen pie business, in a big way.

If you look at that chart that was made up, it would give you the impression that they went from 70 per cent down—

It shows that in 1958 they had 70 per cent of the market.

Now, they are saying this is part. Of course, we start out, of course, at 70 per cent, and then they show they went down in 1958, down in 1959, and down in 1960, and they want you to use that 70 per cent part for them. That, in effect, says to you that they should have 70 per cent of the frozen pie market in this area, not just today, not just tomorrow, but forever. That's what that says, and it says if anyone should invade this market and take the business away from the Utah Pie Company—let's say Pet comes in and takes 10 per cent of this 70 per cent figure, let's say [fol. 1195] we compete for it, let's say that the people of Salt Lake City would like to buy a Pet-Ritz pie, and we compete for it. As soon as we come in and get the business way from the Utah Pie Company, then we have got to pay a tribute to them, the way this chart is made up, this $4.30 fictitious price that is on this chart, then a $4.10 price, then a $3.90 price, then a $3.70 price.

They are saying to you now, ladies and gentlemen of the jury, "Pick out any one of those four," is what they say, "Pick out any one of those four and give us damages, give us any amount of these astronomical damages."

These prices, as you can see—they merely subtracted 20 cents from that, 20 cents from that. They say, "If you don't want to give us 4.30, you can compromise and give us 3.90, is the price to base that on."

Take their costs and subtract them from that, and then stick the Pet Milk Company for coming in here and competing with them, and any future pie company that comes in here, on the theory that the one that is first here, the regional pie manufacturer that has his pie plant here—if you come in and take any business away from him, then you have got to pay him a premium for it.

And what is that going to do to you as a consumer? What is that going to do to you? That is going to force the price of these pies up to $4.30.

The antitrust laws were not designed to force prices up. They were not designed to give any company a regional monopoly. The antitrust laws were designed to get competition so that the American consumer could benefit by that competition.

They are asking that a tariff wall be built around Salt Lake City. If you build this tariff wall around Salt Lake City, then Detroit will build a tariff wall around the automotive industry, and Pittsburgh will build a tariff wall around the steel industry, and Akron will build a tariff wall around the rubber industry, and you can't get into that market, you can't get into Akron, you can't get into Pittsburgh, you can't get into Detroit.

What do you do to Salt Lake City? You do nothing but raise your prices up to exorbitant levels. That's what you do.

This case is an attempt to amend the antitrust laws of the United States and throw protective tariffs around every industrial community. You will pay twice as much for your [fol. 1196] dress as a result of this rule. You will pay more for your automobiles. Anything that you can't make in this community you are going to have to pay exorbitant prices for.

That is the theory that is being put out in this case.

The Sherman Antitrust Act never contemplated any such thing. The Robinson-Patman Act has always been an erosion on the Sherman Act. It is the type of law that is one

of the most difficult laws to understand. Counsel for the plaintiff tells you that you have to charge one price all over the United States. That is not the Robinson-Patman Act, Section 2 of the Robinson-Patman Act.

There are two provisions in the Robinson-Patman Act. One is Section 2(a), called "Cost Justification." You can have a difference in price if you can cost justify, like we do in the Safeway contract. And, secondly, if you meet competition in good faith, it is a complete defense against any charge of violation of the Robinson-Patman Act, a complete defense.

Now, ladies and gentlemen, we have a charge of conspiracy brought against us. The reason a conspiracy case was brought was because conspiracy cases in recent times have been proven by innuendo, by implied language, by circumstantial evidence, by reading something into a course of conduct, that is a conspiracy.

Of all the far-fetched ideas, that merely because the Pet Milk Company owns jointly the General Milk Company with the Carnation Company, a company that was created in 1919 under the Webb-Pomerene Act, an act of the Congress of the United States, which permits competing companies to join an operation in selling overseas.

The Pet Milk Company and the Carnation Company have had to report annually to the Federal Trade Commission all the activities of that company, and those reports are carefully reviewed.

If there was to be some kind of a prosecution of those two companies for conspiracy, wouldn't you suppose that the Federal Trade Commission would have gone after them, from 1919 up until 1963?

All of a sudden it becomes a vehicle in this case to try to get you to believe that merely because the officers of one company meet with the officers of another that they did it to conspire to put the Utah Pie Company out of business.

[fol. 1197] I say to you, ladies and gentlemen of the jury, if this theory should become prevalent in this country, you

couldn't even belong to the same church, you couldn't be found in the same church on Sunday, for fear that on the steps as you went out you conspired to put the Utah Pie Company out of business. What a preposterous theory of conspiracy!

You couldn't belong to the same country club. The Kiwanis—if you were competitors in a hardware business two of you couldn't belong to the Kiwanis Club, because the very fact you met with each other there, you would violate the Sherman Act. What a preposterous theory! This is cynicism at its worst, failure to believe in the fundamental principles of the country, that you are honest and decent and that human dignity has some place left in this world and that the laws that created this country to be the greatest country on the face of the earth are something to use as an umbrella.

I daresay the greatest damage in the world would be done to the Utah Pie Company if that theory would be adopted and put into law.

Now, ladies and gentlemen of the jury, when I started with this case 18 months ago—and we have gone a long road—I cooperated with this plaintiff. I produced nine witnesses for him, including the president of the Pet Milk Company, Mr. Gamble, whose deposition he took in St. Louis, Missouri, and the other officers of the Pet Milk Company; 700 documents produced.

How many did he put in evidence? About 30 or 40. And when he came to this courtroom, apparently he hadn't gotten enough yet, so he had to act like a pick-pocket and go in a briefcase and take out some papers. That was one of the most interesting observations that I have ever made in the courtroom. You wouldn't dare come in here with anything in your pockets; they are apt to be picked.

Now, ladies and gentlemen of the jury, in calling our witnesses we endeavored to bring to you those officers of our company who had the most experience with frozen pies, so that when they testified and were cross-examined that

you would get the truth of this situation. I didn't put them on the stand to lie, and they are not liars.

Now, let's talk about the Pet Milk Company for a couple of minutes, a very honorable company that has served your community here for many years, Clover Leaf Dairy, Sego Products, a company that came up very much in the same way that this company is trying to come up, and a company that is today headed by one of the finest young, progressive American businessmen, Mr. Gamble, a graduate of Purdue University and Harvard Business School, recognized throughout this country as an outstanding individual.

[fol. 1198] Mr. Alioto: If your Honor please, there is nothing in the record—

Mr. Lamb: And yet this gentleman would try to make you believe that he had something handed to him from the company because he was a relative. Couldn't you say the same thing about—

Mr. Alioto: I would like to make an objection, if your Honor please. There is no evidence in this record that anybody in this country regards Mr. Gamble as a great, outstanding businessman. I submit there is no evidence.

Mr. Lamb: Your Honor, I listened to his innuendoes and distortions this morning.

The Court: The objection is sustained.

Mr. Lamb: Ladies and gentlemen of the jury, in 1955 the Pet Milk Company bought the Pet-Ritz Company, a frozen pie company, up in Beulah, Michigan. It being a national company, they built or acquired plants in Fresno, California and in Chambersburg, Pennsylvania, in order to serve the markets in which the Pet Milk Company was already engaged.

We were already selling products in the Salt Lake City market. We weren't just a "Johnny Come Lately." We had been here since 1926. We came in here and introduced frozen pies in this market in the fall of 1956, a year before the Utah Pie Company ever manufactured a frozen pie. And we sold quite a few in the first year.

Mr. Harsha testified that the Pet Milk Company has endeavored to diversify its business in order to remain strong.

Economic growth is one of the things that the President of the United States has been urging upon all of us, find ways to grow economically. That is what the Pet Milk Company was doing when it acquired a frozen pie business in Frankfort and built or acquired plants in Fresno and Chambersburg, giving more work to more people.

Mr. Harsha told you that under the financial philosophy of the Pet Milk Company that the frozen pie business went to the financial officers of the company and borrowed money, which they later would have to pay back, and that they engaged in a business operation which they described as "Investment spending." They have their own funds available that can be invested in other business to diversify.

[fol. 1199] This is the first time in history that I have ever heard it said that you couldn't invest your own funds and then pay yourself back. This is the process we do all the time.

We came into this market, and we were in it for about a year and a half when the Utah Pie Company came into it.

And the Utah Pie Company in 1958 sold about 30,000 dozens of pies, and then in 1959 they sold 37,000, in 1959 they sold 38,000.

In 1958 the Pet Milk Company negotiated the Safeway contract, which was for the manufacture of Bel Air pies. As a result of the negotiation of that contract, the Pet Milk Company got back into the business in this area. They went down severely and then back up.

Later, in 1960, the Pet Milk Company introduced the Swiss Miss pie, which is a 20-ounce pie, in order to try to compete in this market.

What the Pet Milk Company did was to respond to the changing market conditions in this area and throughout the United States in order to stay in the frozen pie business once they got into it. They spent money doing this, their own money. And Mr. Harsha pointed out to you that in

these three years, 1957, 1958, and 1959, that those sums of money were spent, as you can see by the colors, in national advertising, coupons, store demonstrations, samples, and the like. And, as he said, they finally realized at this point that this investment, the amount of these funds, in order to create consumer acceptance of this product—it was time to bring it to a halt. He came into the position of manager of this Frozen Pie Division of Pet Milk Company in 1958, and the plans got effected, and by 1960 he had cut it completely back until finally they were brought into the black, a net profit, into the black.

Now, this process of introducing a new product, of getting consumer acceptance, of getting into the refrigerators in the grocery stores—you ladies know how difficult it is to get the front of the box in a refrigerator. You know you seldom see a different product. Every frozen food manufacturer wants to get in that box. And to get in that box you have got to have a good product and you have got to compete and it has got to be priced right. And that is what they were doing in those beginning years, getting frozen pies into those refrigerators. They were having in-store demonstrations, giving coupons, had the Red Skelton show. They invested huge sums of money to get this product on the market.

[fol. 1200] And what happened? When we first went into this business, there were only about twelve concerns in it—can you imagine that?—in the whole United States, in 1955. There were only about twelve companies.

And once we started this intensive advertising program and these intensive demonstrations, those companies that were already in the pie business, as has been testified here, could get into it very easily. And it is estimated that now there are some 150 to 200 frozen pie companies in the United States.

In connection with this, when you speak of budgeting a loss, my opponent Mr. Alioto places some sinister connotation on budgeting a loss. What this amounts to is that, as

Mr. Wohlhueter testified, he, as the controller, receives from the sales manager what the going market price is in various markets throughout the United States, and he averages that. He has given to him the amount of money that they are going to spend on promotion, on advertising, and what not, and then he is supposed to say back to the company how are we going to come out if we spend all this money. And he has to say, when they are spending money, those huge sums of money, "We may lose some money this year." And they did. They lost in 1957, 1958 and 1959, and those losses are almost directly proportional to the amounts of money they expended for advertising and promotions.

So when an amount is budgeted, that loss is not budgeted to put the Utah Pie Company out of business. That is budgeted to tell management where they are going to come out and whether or not they can spend that same amount of money next year or finally decide that the product has got consumer acceptance, that their product is in the refrigerators of the grocery stores throughout the United States, and that now they don't need to spend that kind of money on promotions.

That also rubs off on these little, smaller, regional pie companies throughout the United States. They get the benefit of that. They can go in and compete with Pet.

Ladies and gentlemen, when the Utah Pie Company came in this business, Gaylen Rigby said they came in a few pennies below. Now, there has been testimony from Mr. Degenhardt, for example, up in Ogden, to the effect that when there is a local producer that has the same price as a company from out of the locality and has the same quality, that they will buy the local product, they will buy the local product, rather than the foreign one.

[fol. 1201] But look here, look here what happened. When Utah Pie came in, they came in down here, down below this.

Now, if what Mr. Degenhardt said was true, they could have come in up here, because they were local and they had their name, the Utah name. People knew that they were

selling fresh pies in this market. And they really had an edge on these outside people. They could have come in right up there equal to them, and they would still have sold pies.

What did they do? They came in here and kept coming down. Then they introduced this Frost 'N' Flame and came way down.

Part of the problem is that they were the price cutters. They reduced the prices. And how could anybody from the outside sell any pies in here unless they came down to meet those prices?

Look what happened to Pet-Ritz. Look what happened to Pet-Ritz. We can't sell any Pet-Ritz pies. We had to come out with an economy pie, the Swiss Miss pie, in order to stay in this market.

That is another thing. I asked Mr. Gaylen Rigby, when he was deposed, "Why don't you make a 20-ounce pie?"

He said, "We have got a lot of cartons left over on the 24—"

Mr. Alioto: There is no evidence of that nature. There is none in this record, and counsel knows it.

The Court: The objection is sustained and the jury is instructed to disregard it. Stick with the evidence.

Mr. Lamb: I am sorry, your Honor. It was in the deposition.

Mr. Alioto: I make a motion to strike the remarks of counsel that anything was in anything. That is not in this record.

The Court: The objection is sustained. The jury is again instructed to disregard it, fully disregard it, lay it out of your consideration, ladies and gentlemen.

Stay with the record.

Mr. Lamb: Yes, your Honor.

[fol. 1202] Your Honor, I did everything I could not to interrupt my colleague this morning.

The Court: I told you gentlemen last night that is the way I was going to conduct it.

Mr. Lamb: I know, your Honor.

stated that he, as a buyer of Bel Air, has to sell his Bel Air pies to his various divisions, and the divisions don't have to buy from him unless they want to.

Mr. Henzke was on the stand here, and told you that Safeway's purchasing agent in Salt Lake City is autonomous; he can buy or not buy Bel Air as he sees fit, and he can buy other pies. As a matter of fact, this little division buys Utah pies, and has bought Utah pies. And the Bel Air pie, the pumpkin and mince pie, has also been bought. [fol. 1206] Now, Mr. Alioto has tried to lead you to believe that that's an exclusive deal in contract and there's something wrong with it. It's not an exclusive deal in contract. That contract was reviewed carefully by the Legal Department of Safeway, by the Legal Department of the Pet Milk Company, and I will assure you that it's no exclusive dealing contract. The contract originally was for a period of one year, and it was to be reviewed every six months. And presently there's no written contract. And presently there is vigorous competition to get that contract away from us. That's the reason I was very careful in not allowing those figures out. Because if Morton and Carnation and Utah found out how our specific prices in that contract, we might have that contract taken away from us. And the Court has protected us in this record in that respect, in asking those people of other companies to kindly leave the room at the time those figures were being discussed. There is vigorous competition for that. And I daresay, if Utah Pie Company meets these quality control requirements of Safeway, because of their position here freightwise, that they will get some business.

Now, all this attempt to tie together this visit of Mr. Schenk's, Mr. Harsha's memorandum, the blind copy, and build a little mosaic out of it, is all wrong. It's not true. Sometimes in lawsuits something happens, like this Schenk. I mean, it's too bad, because it colors the whole issue. It blinds you to the true facts. Therefore, I say to you ladies and gentlemen of the jury, when considering that, look at the facts and not at the one error that is made.

It's interesting to me that when I had Mr. Wohlhueter on the stand to cost justify the prices in that contract, we explained to the Court and the jury how the cost justified, that we took out certain items that we didn't have to spend when we sold Safeway and gave them the benefit of the difference, it wasn't challenged. I wonder if the Utah Pie Company cost justifies to this same accuracy. Mr. Gaylen Rigby testified that they know that certain things cost them less when they sell a pie for less. But did he cost justify? We brought our cost justification records in here. And you can have different prices when you cost justify, and that means that there's no violation of Section 2(a) of the Robinson-Patman Act. And that Safeway contract was definitely cost justified.

Now, the other day, ladies and gentlemen, I showed you this tabulation. This will go into the jury room with you. This is a tabulation made of all the ads of frozen pies every Thursday in the Deseret News and the Salt Lake Tribune. We have the tabulation made showing the retail price of [fol. 1207] all these frozen pies. First of all, I think it would be interesting to note how many different brands were sold here. Across the top here are all these various brands that were sold, competition for the frozen pie business. And you'll be able to see how this retail price dropped, and whose pie it was that dropped. You'll be able to turn these pages over, and you will see that gradually, from 1957 through 1961, that there's been a constant downward movement in the retail price of frozen pies in this market.

Now, that's beneficial to you as a consumer. That's what the antitrust laws are designed to do, to bring about competition so that you can buy at a better price, buy a quality product at a better price.

Ladies and gentlemen of the jury, the two major charges in this complaint, namely, that the Pet Milk Company conspired with Morton and Carnation to put the Utah Pie Company out of business, and that we committed a predatory price discrimination, are both wrong. There is nothing

The Court: Just stay with the record. Proceed.

Mr. Lamb: Mr. Harsha testified that finally, as far as the Pet Milk Company was concerned, we were able to eliminate some of the outstanding expenditures on advertising, promotional allowances, and got ourselves in a profitable position. This company is not in business to lose money. It is in business to make it.

Now, in trying to tell you the full story of the market place we asked Dr. Anderson of Utah State University to make a study of this market. He made what we call a market share study, which has been referred to by the plaintiff and by ourselves, and he also made a study from invoices of the prices charged in this area. And that data was the basis—the price data was the basis of that chart, the one that you see there.

Now, Dr. Anderson was on the stand for a considerable time yesterday, and he was able to point out to you the dynamic aspect of this market, the fact that frozen pie is a product that you can get into very easily, the fact that there are some 13 different brands in this market, eight or nine different companies, and that there has not been a lessening of competition in this area.

He testified as an expert witness that there were other brands, other major brands, Stokeley, Van Camp, Libby's, and so on, that had offices here and were also ready to come in and compete if the price was right so that they could come in and make some money on it. But as long as these prices are down this way, the Utah Pie Company, with the advantages it has freightwise, with the advantages it has as a closely-knit company, it is bound to have a monopoly in this area at these prices, and other producers cannot come in.

But you as consumers benefit by it, because you get the low price, and that's what the antitrust laws are definitely designed to do—to give you.

[fol. 1203] When Dr. Anderson was here, he gave you the statistical data on all fruit flavors from 1958 through 1961,

and you will see by this chart that the Utah Pie Company—the colors that are on the bottom here—have had a steady growth, as against the total growth of the market.

I could take it out here and show you the Utah Pie Company by itself against the total of the market, and you can see that they have grown.

Normally, in one of these territorial price discrimination cases, those bars usually go the other way. If there has been an injury, they go down instead of up. They don't have a share of the market. Then they have something to complain about. But when it is going up, they don't have.

You can see that Pet has the same type of situation. They went from 9 to 25 to twenty—the two here, 83 against 51 and 1027 against 66.

But you can see from the standpoint of the market shares that each of these were growing with the tremendous growth of this market.

Now, that 70 per cent figure I mentioned to you a little while ago on the damages, showing it was going down, you could be misled by that figure. The market was actually going up. The 70 per cent is based on 1958 as a so-called par year.

This same thing is true of apple, and you have already seen that chart, apple being the largest seller. You can see that the Utah Pie Company hasn't gone down. Their volume has increased tremendously.

If they wanted to make some more money, all they needed to do was raise their prices. They could raise their prices. They might lose some volume, but they are in a position where they can afford to do it.

I put Mr. Wohlhueter, our controller, on the stand to negative the idea that we came in here and sell at low prices.

First of all, take a look at this chart. You can see where Pet-Ritz is up on the top, and you can see where Bel Air and Swiss Miss are. We are not selling as low as Frost 'N' Flame or as low as Morton.

[fol. 1204] Our Pet-Ritz, which is comparable to Utah—

they are both 24-ounce pies—were above Utah. That is the reason we can't get any business for Pet-Ritz, because our price is too high. And that is the reason, of course, that we introduced the 20-ounce pie, which is a considerably cheaper pie.

We have had a lot of studies made on this thing to negative the idea that we were selling at higher prices elsewhere in order to sell at low prices here, and I have also showed you the other day the precise prices that we were charging in this market. I read to you, you recall, the $4.00, $4.00, $4.00, as against 3.95, 3.85, and so on.

Now this situation in other markets, as I showed you the other day, Los Angeles versus Salt Lake—Salt Lake is the black, Los Angeles is the brown, and you can see that we are selling at lower prices in that area, contrary to what Mr. Alioto's allegation is.

In the Denver-Salt Lake market we are selling lower than we are here.

In the San Francisco market, in the red, we are selling lower than we are here, which, of course, negatives completely the idea that there was an effort to sell at higher prices elsewhere and lower prices here.

Now, ladies and gentlemen, I want to talk to you about the Safeway situation for a minute.

Mr. Alioto has shown you innumerable times, has read innumerable times two different memoranda: one that was written by Mr. Schenk to Mr. Dittman and the other by Mr. Harsha to himself.

Now, I don't know whether you have ever heard of blind copies, but I have heard about them all my life, and there is nothing sinister about sending blind copies.

I believe that Mr. Harsha in good faith sat down and wrote that letter to himself.

Now, in the case of Mr. Schenk, I was the most surprised man in the world when I found out Mr. Schenk had made that visit to the Utah Pie Company. In many instances American industrialists today will give reciprocal business

courtesies back and forth, and I assumed that is what he had done. But Mr. Schenk used some bad judgment, and I am [fol. 1205] sure he is very sorry. I brought him out here and put him on the witness stand so you could see what he looked like, so you could see his reactions under cross-examination by Mr. Alioto, so you could get the truth of what happened.

You know he didn't look like some Svengali, some person who has a sinister background.

I am sure he would rather not have done what he did. You were able to see, and therefore you are going to have to judge.

The important thing I want you to do is to judge whether or not that visit had any detrimental effect on the Utah Pie Company. That is the important thing, not that he used bad judgment in what he did, but whether it had any detrimental effect.

I brought Mr. Dittman out here because he was the man to whom that report had been sent. Mr. Dittman being the contract officer with Safeway. And he testified under oath that none of that was communicated to the Safeway people.

Now, I was afraid that maybe there would be some doubt about it. Therefore, I called the chief buyer of Safeway to whom that would have been sent, and he said he never received it.

Now, Mr. Alan Young testified that the reason Safeway did not give Utah Pie Company a contract in fruit pies was that they didn't have the right kind of quality control. Now, he was very point blank about it. Mr. Alan Young had been in the Safeway—had been in the Utah Pie Company in 1959. He allowed this man who is a quality control man on vegetables to go in, as he wanted to train to be a frozen pie inspector. And Mr. Alan Young definitely testified that as far as the Safeway contract was concerned, the only reason Utah Pie Company didn't get the fruit business was because they didn't have the right quality. Now, I am sure that came through to you as clear as it possibly could. He further

but innuendo on the conspiracy charge. Sure, there's one letter here, the so-called Eunice Cox letter, where Mr. Hall wrote to the Legal Department and sent on as a zone price. There is no competitor in this land that doesn't pick up his competitor's price list to see what his prices are. How can you compete unless you know what the prices are? There is nothing illegal independently to adopt the price of a competitor. It's when they agree to do it.

Those zones are all different. And that little memorandum to Miss Eunice Cox, in the Legal Department, has no proof of conspiracy whatsoever. That P. S. on the Wright letter, that he had picked up some prices over here at Associated Grocers, plus the General Milk Company, that's all that's on conspiracy. And you are asked to conclude that there's a conspiracy in violation of the Sherman Act on that thin evidence. I tell you, ladies and gentlemen of the jury, there is no violation of Section 1 of the Sherman Act. Section 1 of the Sherman Act is that section which deals with contracts, combinations in restraint of trade. Section 2, monopolies, and attempts to monopolize, also a part of this case. There is no monopoly in the pie business. There is no attempt to monopolize in the pie business, as you can see from the records that have been brought out here.

Now, on the subject of this predatory price discrimination, all of the proof shows that Pet's prices are higher than Utah prices. So did they come in here to put the Utah Pie Company out of business? You've got to show injury. You've got to show a substantial lessening of competition. If you will take a look at that chart, and the market study [fol. 1208] that was made by Dr. Anderson, it will show that there's been no predatory price cutting by the Pet Milk Company here, and that there's been no substantial lessening of competition. And I showed to you that the Utah Pie Company went up in its production, went up in its earnings, and went up in its salaries. Now, how could they be injured, if they did that? Now, if the reverse was true, such

as it was in the Lucky Lager case in this court some years ago, where the production of beer went down, where the profits went down, and when the prices went down, and there was one predatory price cut, you'd have a predatory price discrimination case. You don't have one here, because Pet's prices didn't go down.

All we did was to try to stay in this market. And under the Balian Ice Cream case, what Pet Milk has done is take a look at the things that were costing it the most, eliminate these high promotional expenses, effect economies within the plant, react to the changing market conditions. When private labels came in, we came in and we competed and got a private label. When it was clear that there was a market for an economy pie, after a scientific research we found that there was a market for a 20-ounce pie, we were able to stay in this business by coming out with a 20-ounce pie. What we did was try to become more efficient, and eliminate all the fat, put out quality product, and go out and compete in the market place. And that's precisely what the Sherman Act wants us to do.

It's an odd thing to be accused of a violation of the Sherman Act when your conduct is just exactly opposite of that, precisely opposite to that of a conspiracy or a monopoly.

We are a hard competitor. In this critical hour of this country, where we are competing with goods from all over the world, where our economic growth is being questioned, what we need is vigorous development, economic development. We do not need an erection of a tariff barrier around one particular area of the country. You do not need protection in this area. There is no such thing as a regional monopoly as not being in violation of the Sherman Act.

I say to you ladies and gentlemen, beware of this 70 per cent damage provision. If you are to find a base year, find one that's at least an average, in order to be statistically correct. I say to you, when you examine all of the evidence in this case, be sure you keep in mind that you may be the first jury in the United States to amend the Sherman Act,

to allow regional protection and to eliminate competition. You may be the first jury that does that you consider [fol. 1209] this as the most important assignment that you've ever had in your lifetime. Because our competitive system is being challenged throughout the entire world. It's vigorous competition is what we need and what we have. And that competition is the greatest savior of the Utah Pie Company. These young men will grow in vigor with competition. If they get bigger and bigger, and get more control of this market, and get protection for it, they'll get soft, and they will not be a credit to themselves or to their ancestors.

Thank you very much for listening.

ARGUMENT ON BEHALF OF CARNATION BY MR. BILLINGS

Mr. Billings: Your Honor, ladies and gentlemen of the jury, it always seems to be my fate to come on at the end when we are all tired and worn out. I will try to be as brief this afternoon and to the point in my remarks to you as I was brief and to the point in the evidence we finally got a chance to put on yesterday afternoon.

You have probably been wondering with me why Carnation is even in this case, there has been so little evidence about us. I haven't heard anyone claim that Carnation had any dive bombers on prices or any fighting ship brands or any espionage. In fact, the record shows that all this warfare, to continue the metaphor, resulted in Carnation being the one that got shot up.

For example, the record shows that on apple pie, which is the biggest single seller, our percentage of market share in the four-year period just dropped in half.

So I think in light of that situation I would like to focus your attention on what I think is the central issue here. We have had a lot of side issues, a lot of red herrings, but so far as Carnation is concerned there is just one fundamental issue here, and I would like you to think about that issue and think about whether the whole concept is one that is really believable.

You are asked to believe that Carnation has joined in some sort of combination or conspiracy or agreement with its arch competitors, Pet and Morton, in order to destroy the Utah Pie Company.

Now, I want you to consider all the evidence that has come in in this case, consider whether that concept can be believable with respect to the Carnation Company. You are asked to believe that, in order to destroy the Utah Pie [fol. 1210] Company in a market where we never had any more than 10 per cent of it, and so far as the Western markets of the Carnation are concerned, it is the least important of all markets. You are asked to believe, with respect to a market concerning that minimal importance, we had to agree to do this sort of thing: We had to agree to let Pet have this Safeway contract with all these millions of cases, and we had to let Morton have the Denver market. And you can just compare the magnitude of the market in Denver with this little Salt Lake market.

And then you are asked to believe that we agreed with Morton and Pet to keep high prices in California where our plant is, and the only result of such high prices would be that our other competitors would get all the business in California. And you heard Mr. West talk about that 13 million people, or whatever it is, in Southern California, the biggest potential market in the world. And you are asked to believe we would give that market up to our competitors in order to destroy the Utah Pie Company.

Now, I ask you, does that sound like good sense?

Now, that is the fundamental issue in this case. If you can believe that that sort of thing makes sense, then all this stuff about fighting brands and espionage, and so on, might have something to do with this, but if you agree with me that that sort of a concept doesn't make sense, then we just have no business in this case.

Now, there is one other claim against us, and that has to do with this high leg—low leg business. And I have a little trouble in my mind trying to fix just where Carnation's low leg is supposed to be. Every chart that has been

introduced in evidence, all the way from Dr. Anderson's over here in this corner, and these charts here, and these smaller charts for Salt Lake City, show you—the red line is what I am talking about—that Carnation's prices were well above the market price and well above Utah Pie's price.

Now, where does this low leg belong?

There was only one point in all these four charts for the four years where the Carnation price crossed the line where Utah Pie price is. Utah Pie is the brown one. This is just a smaller version of that large chart. And that is this point right here in February of 1960.

[fol. 1211] And if you remember, Mr. Murphy yesterday, the merchandise manager of Carnation, told you about that. We had a special pack with a limited number of pies and with a limited number allocated to each customer and for a limited time only. And this was a very limited introductory offer. How that particular limited sort of situation could have any effect on competition is just beyond me. Everybody in the market place knew—it was publicly announced—that this was that limited type of offering. So there really isn't anyplace where you can find that Carnation Company was in the low price area. These very figures about our volume and the way it dropped is indicative of that. We just got priced right out of the market.

Now, you remember Mr. Rigby on the stand, when he was trying to tell the story of how Utah Pie had to keep dropping its prices. He stated on direct examination that he had to cut his price in 1958 because of something Carnation did.

Well, then I asked him on cross-examination about that, and he said, well, he didn't really know; it was something that one of the buyers in the market said, "Carnation is cutting your price, its price, and so you had better come down to meet it."

So his statement in the first place was merely based on hearsay, and it is belied by the facts. Here is the record. Here is the chart for 1958. And Mr. Bye testified yester-

day, without contradiction, mind you, that he had gone through every invoice for the Salt Lake City sales for these four years and made up this IBM report, and he showed that we didn't have any such price cut in 1958. Here is the cut Mr. Rigby was talking about, where Utah Pie cut its prices. So he is just not supported by the facts. There just isn't any evidence in this case that any price activity of Carnation Company had any effect on competitive activity in the market. And how could it? Not only were our prices higher, but our volume smaller.

And I read to you yesterday some of these figures from this exhibit about our sales to the Big Three. You remember there has been a lot of evidence in this case about the Big Three, Associated, Safeway, and Utah Wholesale. And their customers are the ones who advertise on the Thursday newspapers, and those that advertise low, low prices are the ones that set the price pattern in this market. And we just had a piddling little amount of sales to those people. We had about 10 per cent of the amount Utah Pie sold and, in fact, in 1961 we didn't even sell any pies to Safeway at all.

[fol. 1212] Now, how could anything that we have done in the way of pricing activity in this market, or any other market have any effect on competition in the Salt Lake market under that situation?

I don't deny, we have never denied, that we have had different prices at different times, in different markets. That's just the way the pie market works. You heard our witnesses yesterday. The situation in San Francisco is treated independently of every other market, the situation in Los Angeles is treated independently of every other market. What they are doing is they're pricing their pies in those markets to meet the competitive situation in those markets.

Now, for example, here is a chart comparing the Carnation apple pie prices with the, in Salt Lake City, with its prices in southern California, right around its plant.

Now, this is like these other exhibits, the Salt Lake price is a straight line, in the sense that it's the one with which Los Angeles is being compared. You know it's not a straight line, because you have seen these charts where the prices move. But this is a relationship chart. So this shows the relationship of the Los Angeles price to the Salt Lake City price of apple pie. And you can see the pattern. For most of the period the Los Angeles price is well below the Salt Lake City price, which is this black line in the center. There are occasions when it crosses. And you'd expect it to cross, because competitive situations might change from time to time in those two markets, and we'd have to respond to whatever the competitive situation was in that particular market.

There just isn't any relationship of one market to another. So how can there be any price erosion in the Salt Lake City market from what Carnation did.

Now, those, as I say, are the two big points in this case, so far as Carnation is concerned. And I think I only need to spend a few minutes more in talking about some of the details, and how they affect those two big principal points.

There's been a lot of testimony in this case about selling at a loss. Now, the Court will tell you, I'm sure, that selling at a loss in and of itself, is not a violation of the antitrust laws involved in this case. The only materiality it could have to this situation is whether it's indicative of any intent on the part of Carnation Company, say, for example, to injure a particular competitor. For example, [for. 1213] if we were selling at a loss in one particular market, where that particular competitor only was located, and we were selling at a profit everywhere else, then you might well consider that we were selling at a loss for the purpose of injuring that particular competitor. That's not the facts here. The facts here are that with respect to the Carnation Company, unfortunately on 8-inch apple pies, we are selling at a loss everywhere. Every single market, not just the ones where the plaintiff competes, but every single market in the United States, all the

way to the Mississippi River, we are losing money on 8-inch apple pies.

Now, it seems to me you can't take from that kind of evidence any intent on the part of the Carnation Company to injure the Utah Pie Company or anybody else. We are the victim of a situation here. We start out primarily in the 9-inch business. Then we had this 7-inch pie, you remember, that Mr. Halgren talked about yesterday. Then we found that we couldn't sell a 7-inch pie, because it looked so much smaller than these eights, so we got in the 8-inch market. And now we are faced with a situation that we are losing money on these 8-inch pies.

Now, what are we doing about it? Well first I want you to understand that when we are talking about losing money, we are not talking about selling these pies at a price below what it costs us to produce them. The evidence in this case is clear that the price we sell these 8-inch pies for, everywhere in the United States, is well above what it costs us to produce them. Where we get in the loss picture is where we start allocating the general overhead of the company. So that if we didn't make any pies at all, that general overhead would have to be picked up by some other product.

So that in addition to that, the cost figures which are in this case show that with respect to the pie plant itself, down in Torrance, there's some fixed overhead, that is, the depreciation on the building, machinery, and all that sort of thing, and that on 8-inch pies it shows that 30 cents of every case contributes to that overhead, that cost which we would have anyway if we didn't produce any 8-inch pies. And those same figures, which are in evidence, show that each case sold contributes 50 per cent toward gross profit. [fol. 1214] Now, as I said, allocating some of these other costs of operating the company to the pie business is more than 50 cents per case, and we do have a loss. But it is not—we are not selling below the cost of production. And we are not selling at a loss in any one particular place. This is a situation which is common to us all over the United States where we are trying to sell 8-inch pies.

Now, what are we doing about that? Well, I asked Mr. Halgren that question yesterday, and you heard his answer. We're trying to reduce our costs, and we are trying to find some new products that we can substitute for the 8-inch pies, and maybe sell those at a profit. He mentioned the cream pies, which we have developed. But as long as every case of pies we sell, 8-inch pies we sell, is contributing 30 cents per case to the overhead of that plant in Torrance, then we are not losing by selling these pies. And when we can find a product we can sell at a net profit, then, of course, we can substitute for it.

Now, that's all there is to this loss business. It seems to me that in light of all the facts in here, there's just no basis for talking of any consideration that the Carnation Company is selling at a loss for the purpose of destroying this plaintiff. And that's the only relevance it has to this case. I wish we weren't selling at a loss. I'm sure everybody wishes we weren't selling at a loss. It's not a very happy situation. But it's certainly not a situation aimed and designed for the purpose of injuring a competitor. You can see that.

Now, there have been some other *periphal* issues here in connection with this other basic issue of this conspiracy, which I told you is inherently incredible. The talking about this zone map, and Mr. Alioto made some reference this morning that this map wasn't right. It doesn't show western Nebraska. And I just call your attention here, that here is the Nebraska state line (indicating), and the Panhandle. And here's our line (indicating). It very clearly includes western Nebraska in Zone 2. So there's nothing phony about that zone map. But the thing about zones, and these price lists, is whether or not they are identical. And clearly those two zones, the Morton and Carnation ones, are not identical. And whether all published price lists are identical, really has nothing to do with this case.

Now, if two competitors have identical prices, it can mean one of two things. It can mean they agreed on those,

or it can mean that they're competing vigorously with each other. But with respect to price lists, they have noth- [fol. 1215] ing to do with this case. Because the evidence is, clearly, that with respect to frozen fruit pies, you don't sell pies at the price list, you sell them on what these particular deals are. So there's just no evidence of any parallel combat, if you would have it, of the Carnation Company if any of these other defendants in connection with particular deals that are established in each of these various markets.

Now, there's been some talk about our opportunity to get together. Well, of course there is. But as someone mentioned here earlier in the day, you can pick up the telephone at any time, or you could get on an airplane and fly to the office of one of these other people. Of course Carnation management have an opportunity to talk to the Pet people. No problem about it. But you're asked to couple that type of opportunity with this inherently improbable type of conspiracy. I can't see where the fact that there was any opportunity supports any such theory of conspiracy.

Now, the evidence in this case shows—and the best evidence in this case are these price charts—show that we are vigorously competing with our competitors in every market. Look at the way the prices are all over the map here, the red line being Carnation. And you can take any market, any year. There's Denver, for example (indicating), and here's what it looks like. Now, if we were conspiring together, you would think that these lines would be pretty well on the same, we would be fixing the prices and we would have identical lines here.

These charts portray better than any table of figures, or bunch of price lists, or any argument, how clearly it is that these people are competing with each other vigorously in every market. And that's been the pricing pattern in every market.

Now, in conclusion, I can only say this: that all this vigorous competition is portrayed by these charts, all this

introduction of product brands. We didn't introduce any private brands. The only brand we sell is the Simple Simon brand. We don't have any private brands. And introduction of these cheap pies. And we haven't introduced any cheap pie. We are still selling the same 8-inch pie in 1961, the end of this period, as we were selling in 1958, the beginning of the period we are talking about.

The only effect of all this type of competitive activity, and these decline in prices of these charts show, is that our share of the market is diminished. That's what these market share studies in evidence show. So it seems to me [fol. 1216] the only thing you can conclude, ladies and gentlemen, is that if anybody got hurt in all this competitive activity, which is the type of activity that the antitrust laws are designed to support—the antitrust laws are designed to have people out competing with each other—the only one who really got hurt in this Salt Lake market was the Carnation Company. And we are not suing anybody.

Thank you.

## Additional Argument on Behalf of Utah Pie by Mr. Alioto

Mr. Alioto: Ladies and gentlemen, I'd like first to address myself to the so-called charts, that it goes to prove something. I'm sure you remember the evidence about these charts, and that chart, and every price chart they had in here, including this pretty one over here, the one that's under that map. This chart, this chart, and all of these charts (indicating). I am sure you remember the very clear evidence, ladies and gentlemen, that even though they have their own business records available to them, and even though they had statistical organizations in St. Louis, in Salt Lake City, and in New York, they didn't go to the trouble of getting their price lists and adding to them all of these deals off the invoice, or that don't show on the invoice, to show you exactly what the true price is.

For example, there is no relationship between these Pet-Ritz prices shown here (indicating) and the Pet-Ritz prices that were actually charged and paid by the wholesalers involved.

Now, I am sure that you remember all of that testimony about the facts. And every time they introduced one of these charts, we said, "As to admissibility we are saying nothing, but as to weight, we expect to show that you have the materials on hand to show what the truth was, the absolute truth." And therefore, when you have the materials on hand—

Mr. Lamb: Your Honor, I object to this, this is a distortion.

The Court: Overruled.

Mr. Ahoto: When you have the absolute materials on hand to show the absolute truth, and you choose not to use those materials—as every one of their witnesses testified—and when you have those materials and don't show them, and then get up and argue, this is what really shows the picture. You can judge for yourself what type of thing they're trying to do to you here, and what type of confusion they are trying to introduce in this case.

[fol. 1217] Now, so far as the Carnation Company is concerned—that's true of all of these other charts. For example, you remember the Carnation Company's deal in Seattle? "You buy a truckload, and then we'll send you a check back for a thousand dollars"? That doesn't show on these lists, Doesn't show on these lists. But they have the records, actually, to show it to you. They chose not to do that. Now, what do you conclude from that. And then they add to it, "These are the things that you must use to know the truth," knowing that that's the state of this record.

There is a very interesting study in this case that the Morton Company put in, that was prepared to show the price lists minus all of their deals "as best we could do it.

You have it all, as best we could do it." And it shows things like this—there's no combination going on, according to the attorney for Carnation:

On May 5, 1958, in the Los Angeles market, May 5, 1958, the prices on apple, cherry, peach, and boysenberry, for Continental, on a new price list dated May 5, 1958, $2.21, $2.33, $2.21, $2.33.

The same day a price list of the Pet Milk Company, $2.21, $2.33, $2.21, $2.33. Identical to the penny.

The same day a price list of the Carnation Company, minus all the deals to get down to an absolute net, as close as you can get to it $2.21, $2.33, $2.21, $2.33. Identical to the penny on the same day.

Now, do you think they're all clairvoyant? Do you think they all knew that some kind of fortune telling what was going on in these offices? And do you wonder why they have to bring you things like this, and say, "Please look at these lines," when every bit of testimony in this case is that these lines don't represent what the people actually paid, and that those lines don't represent it either, what people actually paid?

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[fol. 1221] Now, the facts produced here by Dr. Anderson, not by me, not by our side—he made a market share study. It was a localized thing, just around Utah, to be sure, but he made a market share study. And do you know what it shows? That in the first year, 1958, eight per cent, eight per cent, of all of the pies in this market study were other than the people in the courtroom. All of these other pies we are talking about, the competitive pies, were eight per cent. So that the three companies in Utah had 92 per cent.

Do you know what the percentage is the last year of all other pies except Utah, Morton, Carnation, and Pet? It was eight per cent the first year; it was six per cent, all others, the last year.

Now, there are 226,000 dozen; all other pies accounted for 18,000, six percent. So don't be misled about all of

this conversation about all of the great competitive pies there are in this area.

As I said before, you just look at this evidence coldly and dispassionately and the facts emerge. You don't have to listen to oratory, because it is all in this record.

Now, it was shocking for me to hear the Pet Company. The other two have admitted the price differences, that they have a low leg here and a high leg somewhere else from time to time during this period. The Pet Company right up until the end denied it, again by conversation.

This is their own Safeway contract, where they had to set out their prices, and set them out as coldly as they knew how. This was something just between themselves and Safeway. And they show you that the Los Angeles—San Francisco price is 2.32. The Pet-Ritz price in Salt Lake City on apple is 2.16. That is a difference of 16 cents a case or 32 cents a dozen difference. And the low price is in Salt Lake City, 750 miles away from the plant, and the high price is out in California, exactly where the plant is located. If you were standing right at the door of the plant, you pay 32 cents a dozen more on the formal price listing, the formal prices that they gave the Safeway Company.

So while the other two have admitted the price differences, Pet denies it. This is the cold fact in the record.

Now, you remember that conversation about this pickpocket deal, that I picked somebody's pocket in the courtroom. Well, of course, the thing I picked out, you remember, was this memorandum of Mr. Harsha that we had so much testimony about.

[fol. 1222] Mr. Wohlhueter brought this thing to the courtroom. He brought it to the courtroom because he believed that it had something to do with the testimony he was giving. And so when I asked him for whatever supporting data he had for the testimony he was giving, he said he had it right here in the suitcase. So I asked him if he would hand it to me. And he handed me a whole

big pile. And imbedded in that pile was this little document that Mr. Harsha wrote, the document where he says it doesn't mean what it says, or at least his oral testimony is different from the written testimony here, and you can make your own decision as to which is the truth, what he says from the stand or what he wrote in this instance.

But, in any event, it is perfectly clear that when an objection was made about having this, you remember, the court said, "Counsel has a right to have it because it is a document in the courtroom which the witness believed had something to do with his testimony."

Now, if this is picking pockets, you can make the most of it, Mr. Lamb, if this is picking pockets, to get relevant evidence. I just keep wondering out loud why we didn't get this document before it was pulled out of that briefcase. This is really a question I wonder about. And when you heard the testimony about it, I think you all knew why we didn't get the document.

Now, the argument has been made—and I am almost through now—the argument has been made by the Morton Company: Well, we only have a little business in this market. How could we hurt anybody?

When you have a nationally advertised brand like the Morton brand, and where you put as much behind it as Morton has put behind this thing, when you have that kind of a brand and the kind of advertising, and the willingness to come in here and sell at a loss, and you offer it to everybody, when you offer Safeway 15,000 cases, a low price on 15,000 cases offered to Safeway and offered to everybody, you as surely erode the price as if you were offering half a million cases. This is just common, ordinary business sense, as you folks know.

So don't be misled by this conversation that "we only have a little volume, just a little volume, in this area."

The point is if they had expanded the whole trading area to include the entire Intermountain, the entire Intermountain area, as Dr. Anderson said he could easily have

done, then you would have seen the real volume of the Morton Company, particularly in the Denver market, which is apparently controlled by them.

[fol. 1223] And when we get down to low prices, who has had the lowest prices in this area on a branded commodity? And there is a lot of difference between a branded commodity and a private label deal. This evidence came in yesterday. Swiss Miss, the little fighting ship, the little fighting brand, of the Pet Milk Company, was selling in here. Utah Pie was at 3.60; Swiss Miss 3.29; Utah Pie 3.60; Swiss Miss 3.25, 3.25, 3.25, 3.29. And finally when that price develops and Utah Pie is forced down to 2.75, that is the only time it is below the Swiss Miss. The Swiss Miss is down all the time.

They say it is a lighter pie, it is a smaller pie. But, ladies and gentlemen, you heard this testimony, and you make your own determination. A pie is, after all, a pie. And one day I held in my hand, you remember, the full 24-ounce pie of the Utah Pie Company and the 22-ounce pie, and there was no discernible difference at all. And the reason these fighting ships or these fighting brands are used, when you can put a brand name behind it and spend three million dollars advertising with Red Skelton, and then you throw it into a regional area, this is as surely undercutting the price as if you came in here with exactly the same kind of a pie and put it just a little bit lower.

You may see that price differential, 3.60 for the Utah label as against 3.29 and 3.25 for Swiss Miss.

And this is why. Though Utah Pie, on its branded label, starts out with the major portion of the market, at the end of the period the Pet Milk Company has the major portion of this market on branded labels.

And branded labels are important; they are very important. I think you folks understand there is a practical business involved in this thing. If all you do is get yourself into a private brand deal, you are captured, because if that private brand should change, if it changed to somebody

else, then you are gone, because all of the advertising was on the private brand, which is associated with one buyer.

But if you have your own brand name, like the Utah brand, or Pet-Ritz, or Swiss Miss, or Morton, or Simple Simon, then that belongs to you and that distribution can't be abruptly pulled out from under you.

And if they ever got the Utah Pie Company to the point where all of its regular brands, or its own brand business was reduced to almost nothing—and it is on its way down; you remember from 70 per cent down to 30 per cent, and it would be lower if this continued—you get them in that position, and the ability to administer the final blow, that final blow, becomes quite easy.

[fol. 1224] I didn't get a chance—this is from the annual report of the Continental Baking Company. I didn't get a chance to show you the location of their plant in Virginia. Way over here, in relation to the Denver, Colorado market, way over here, the Continental plant in Virginia. They came into Denver, Colorado at substantially lower prices in Denver than they charged that organization that was right at their door in Virginia itself.

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[fol. 1225] In the beginning of this period, as I told you, these prices were increased. They went up to 5.16. And when they started to compete heavily in this area is when the prices were brought down to the very low and vicious levels to which they were brought by these defendants.

Now, the final argument is—and it is an argument that lacks logic and lacks validity and sense—the final argument is: What do you want to do? Build a wall around Salt Lake City? They are going to build a wall around Detroit if you do this to them. They are going to build a wall around even the place where they make the dresses for you ladies. Do you remember that argument? Isn't that ridiculous?

Nobody wants to build any walls around Salt Lake City or any other place. All we want to do is to be able to compete, to fight it out in the market place on the basis of fair competition, and not the kind of competition that can utilize those millions and millions of dollars of profits for the purpose of operating continually in one area at a low cost and finally driving out that independent and certainly injuring him during this process.

Sure, we want to compete, and everybody is free to compete. Everybody is free to build a competitive pie company, in Ogden, in Salt Lake, in Denver, in Montana, any other place. And even the national companies are free if they do not violate the price discrimination and have that low price where the competitor is. The national companies are free to come in here at the lowest price they want to come in on, providing they do it everywhere, provided they do it nationally. And this is the policy of the law.

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[fol. 1226] I do want to explain one last thing, because it could be confusing. It might give somebody a chance to use a technical ground. And that is: You will be asked, I believe, to fix the damages separately for each defendant. And we have done that for you. For example, when the [fol. 1227] Morton Company complains that in this area it only did something in 1961, it only went down to this very low price—we had an awful time getting on the chart, you remember—it only went down to this very low price in this period of time and didn't do it in here.

The distribution to each of the defendants has been made in accordance to its participation and share of the market. So that has already been taken care of right in this summarization of these damages. You make your choice of where it should be. And you can make your estimates in between and use these figures from which to do it.

And, finally, when you get down here, let me remind you again that these are the final totals, at a 4.30 level,

final totals at a 4.10 level, 3.90 and 3.70. They are marked on there for you. You can go between them or any other way. The total is set out individually for the companies to encompass everything down in this area. And it is set out in totality for all of them.

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[fol. 1228] COURT'S INSTRUCTIONS TO JURY

February 21, 1963
4:20 p.m.

(Jury in the box.)

The Court: Ladies and gentlemen of the jury, this delay is due to problems the judge has had in completing the preparation of this charge. It is not attributable to counsel in any respect. It is my responsibility. I finally got it straightened out and I am ready now to talk to you about the law which applies to this case.

I wish it were possible for me just to turn around and talk to you. I know that it is a more entertaining way to do it and also it is sometimes more plain and clear and simple, but we are dealing with a subject which I think requires very careful examination, so I will ask you to pay strict heed to what the Court has to say.

I am going to take my time. I am not going to talk to you fast. And we will go through this subject matter.

Each defendant in this case, ladies and gentlemen of the jury, is entitled to individual consideration of the evidence as applied to it to determine whether that particular defendant individually violated the anti-trust laws or participated in any illegal combination or conspiracy.

No defendant should be prejudiced in the minds of the jury merely because it has been named by the plaintiff as a defendant in the case. The fact that several defendants may be represented in part by the same lawyer or group of lawyers does not alter this situation.

The plaintiff and defendants, as you have noted, are corporations. In this connection I instruct you that a corporation, although an artificial being, exists only in contemplation of law, is held to the same measure of legal liability or non-liability as an individual, and is entitled to the same rights and protection, and is subject to the same duties and obligations.

The policy of the law declared by Congress that competition in interstate trade and commerce should be free of unlawful discriminations or conspiracies, combinations or agreements in restraint of such commerce and trade, is not open to question by us. Whether you are a rugged individualist or whether you sense the importance in some areas of regulation does not mean that the law should not be applied, nor, on the other hand, does it mean that it shall be applied beyond its true meaning.

[fol. 1229] Congress established that policy, and we are all bound by it, including the Court.

The plaintiff in this case, ladies and gentlemen, has, in effect, four claims. The first is a claim that it was injured by reason of a conspiracy among the three defendants in violation of Sections 1 and 2 of the Sherman Act.

The two sections I have referred to, insofar as pertinent to this case, are as follows:

Section 1 says:

"Every contract, combination, in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several states is declared to be illegal."

Section 2 of the Sherman Antitrust Act, insofar as it is pertinent to this case, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states violates the law."

The plaintiff also claims that each defendant individually violated Section 2(a) of the Clayton Act by charging dif-

ferent prices in the Salt Lake trading area than each charged in other areas for pies of like grade and quality, where the effect of that difference in prices had the reasonable probability to lessen competition or tend to create a monopoly.

That section, with its exceptions, reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who grants such discrimination."

But then there is a priviso which reads:

[fol. 1230] "Nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities or to such purchasers sold or delivered."

And there is the further proviso that "nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for, or the marketability of, the goods concerned, such as, but not limited, to actual or imminent deterioration of perishable goods."

And then the statute goes on to provide a complete defense for what would otherwise be a violation of the statute in Subsection (b) of Section 2 of the Clayton Act, and that subsection provides:

"That nothing herein contained shall provide a seller rebutting the prima facie case thus made by showing that the lower price or furnishing of services or facilities to

any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

Finally there is Section 4 of the Clayton Act, which says:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States."

The claims of the plaintiff under this section are against these three defendants individually and separately. Thus you have one claim of the plaintiff that the three defendants have jointly violated Sections 1 and 2 of the Sherman Act, and three claims that each defendant individually and separately violated Section 2(a), making a total of four claims.

I shall first discuss Sections 1 and 2 of the Sherman Act and then separately discuss Section 2(a) of the Clayton Act. At the conclusion of these instructions I shall give you four forms of verdict in order that you may make a separate finding on each of the four claims.

Under Sections 1 and 2 of the Sherman Act the plaintiffs claim that there has been a conspiracy—no, pardon me—under Sections 1 and 2 of the Sherman Act, the defendants claim that there has been no conspiracy among the three of them, or between any two of them. The defendants ask, therefore, that a verdict be entered for each of them, and [fol. 1231] against the plaintiff, on the allegations that they have conspired in violation of Sections 1 or 2 of the Sherman Act. And the defendants claim, under Section 2(a) of the Clayton Act, first, that the complaint alleges that each defendant has violated Section 2(a) of the Clayton Act by charging low prices in Utah and higher prices elsewhere. The defendant says these charges are directed against the defendants individually. In considering these separate allegations you are therefore to make a determination for or against each defendant on the basis of the evidence relating to that defendant alone.

Each defendant claims, with respect to this allegation, that it has not charged lower prices in Utah than elsewhere, except as it may have done so to meet changing market conditions, and to meet an equally low price charged by a competitor in Utah; and that in any event competition has not been injured by the defendants' pricing policy in Utah, and that the plaintiff has not been injured by such policy.

Each defendant asks, therefore, that a verdict be entered for it and against the plaintiff on the individual claims.

You will notice that all of the statutes refer to persons. As you know, all the defendants in this case, and the plaintiff are also a corporation. It's necessary for me to say that a corporation is a person within the meaning of these statutes.

There are some words in those statutes which you need not trouble yourselves about. It is not necessary for you to be bothered about the question of whether interstate commerce is involved. There is no controversy about the parties that this case involves interstate commerce. You are therefore instructed that on the basis of the undisputed facts, if any violation of the antitrust law be shown in this case, it would involve commerce among the several states, or interstate commerce.

It is also undisputed that all of the pies sold by plaintiff are of like grade and quality, as those words are used in the statute, and that each of the pies sold by each defendant is also of like grade and quality, when compared to all of the other pies sold by the same defendant, and you are so instructed.

Finally, it is not contended that difference in prices, differences in prices charged by plaintiff, or any defendant, are justified by differences in the cost of manufacture, sale or delivery of pies, except that Defendant Pet does claim [fol. 1232] this so-called cost justification with respect to any differences between the price of Bel Air pies, which it packed for Safeway, and it's other pies. And plaintiff claims the cost justification with respect to differences be-

tween prices charged for its Utah Pie label and the prices charged for its private label brand.

Now, the plaintiff has charged each of the defendants individually with violating the antitrust laws. And it has also charged the defendants with having conspired to violate the antitrust laws. Therefore, I must instruct you on the law under which you must consider whether or not any of the defendants has violated the law individually, as well as the law, and whether any of the defendants has conspired together to violate the law. And I will do so separately.

I'll explain to you what it is that you must consider when you decide whether or not any of the defendants have violated the law individually. I will also explain to you the law under which you must decide whether or not any two or more of the defendants have conspired together to violate the law. We shall deal with the conspiracy law first.

Since the plaintiff has charged the defendants with a conspiracy to violate the antitrust laws, you must consider whether all of them, or any two of them, have conspired to violate those laws.

I will now tell you what a conspiracy is, ladies and gentlemen.

You are instructed that as contemplated by the Act of Congress, which I have read, a conspiracy is a combination or agreement between two or more persons to do an unlawful thing, or to do a lawful thing in an unlawful manner. The existence of a conspiracy may not be merely presumed or based upon conjecture. This connected circumstances, all of which are as consistent with a lawful purpose as with an unlawful undertaking, are insufficient to establish the existence of an unlawful conspiracy.

The proof must satisfy you by a preponderance of the evidence that a conspiracy existed in fact, and it is not enough that the evidence may raise merely a suspicion or a possibility, and nothing more. But a conspiracy, if any, does not have to be founded upon or proved by an agreement in writing, or any formal document. It can be an

agreement spoken at one time, or in a series of conversa-
[fol. 1233] tions. It can be in writing or oral. It need not even be formed into words written or spoken, so long as there is at least a tacit or implied understanding of an unlawful conspiracy between the parties.

Indeed, it is seldom possible for one to show an express agreement to enter into an unlawful conspiracy, or to furnish direct evidence of such conspiracy. Therefore, conspiracy may be found, if the facts justify it, from circumstantial evidence and from reasonable inferences, based upon what is said and done, or from courses of conduct, or from circumstances sufficiently strong to give rise fairly and reasonably to an inference that such conspiracy existed. There must, however, be shown a common purpose, supported by a concert or combination of action.

In deciding whether or not any two or more of the defendants have conspired together to violate the antitrust laws, you may consider whether or not they have knowingly followed the same business practices. The mere fact *that* that any two or more defendants may have at some time or times, or some places set the same prices for pies, or created substantially the same zones for the sale of pies, if indeed you find that any of them have done any of those things, does not of itself prove that they have conspired together, but it is evidence which you may consider along with the other evidence in the case in deciding whether or not any two or more of the defendants have conspired with each other.

There has been some evidence in this case about the defendants Pet Milk Company and the Carnation Company, and their relationship with the General Milk Company. Now, I want you to understand that it is not unlawful for those two defendants to own the General Milk Company, or to jointly operate it overseas. But you need not consider it as an isolated circumstance in deciding whether or not Pet and Carnation have conspired together. That is, you may consider evidence that meetings of the General Milk Company may have permitted executives of the Pet Milk

Company, and executives of the Carnation Company to meet with each other, along with all of the other evidence in the case, if any, which tends to show that the defendants cooperated to fix prices by agreement, to set up substantially identical price zones, to use delivered prices, to engage in below-cost selling in the Utah trading area, to eliminate competition among themselves while competing against plaintiff on the basis of different prices in plaintiff's trading area than were charged in areas where plaintiff did not compete.

[fol. 1234] I instruct you that you may consider all of this evidence in relation to all of the other evidence in your determination of whether those defendants, or any two of them, entered into a conspiracy as I have defined the word for you. The evidence should not be considered in segments. You must consider it as a whole.

In connection with the question of burden of proof, and preponderance of the evidence, and with specific reference to the issue of conspiracy, you will be governed by the following rule, notwithstanding the initial limitation by which evidence was offered by the plaintiff, or was received by the Court in the first instance.

The existence of a conspiracy cannot be established as to one defendant by the acts or statements of its conspirator, or co-defendant, unless the existence of the conspiracy and on defendants with it is shown. Each defendant's connection with the alleged conspiracy must be established by independent proof received as to it, by evidence received as to it of its own acts, its own statements, its own conduct, and the reasonable inferences to be drawn therefrom.

If as to any defendant the conspiracy has not been so established, as to it, a conspiracy should not be sustained. But if from such independent proof you find that a particular defendant or defendants were parties to a conspiracy, whether in and of itself illegal on the basis of such independent proof, then you are instructed that any acts, statements or conduct of each of the conspirators, if done or said in the course of and in the furtherance of the objec-

tives of the conspiracy, would be chargeable and could be considered as against all of the co-conspirators, notwithstanding the limitations under which the evidence initially was offered or received in this case. For in such event, the conspirators would be deemed to be the agents of each other in carrying out the purposes of the conspiracy.

If you find from such independent proof that any two or more defendants actively participated in a conspiracy to fix prices of frozen pies in the Utah area, then you are instructed that the acts, statements, or conduct of each conspirator are chargeable to all of the conspirators. In law, conspirators are deemed to be the agents of each other in carrying out the purposes of the conspiracy.

I instruct you that if you find that any two or more of the defendants have conspired together for the purpose of establishing the price at which they would sell frozen pies in the Utah area, such conspiracy was a violation of the antitrust laws.

[fol. 1235] Now, as to the individual violation, up to this point, ladies and gentlemen, as you must have observed, of course, I've been talking about plaintiff's claim that two or more of these defendants conspired together to violate Sections 1 and 2 of the Sherman Act. This is the conspiracy claim. Now, I move on to the claim of the plaintiff that each of these defendants violated the statute individually and separately from one another.

As to the individual violations of the antitrust laws, if any you find, which have been committed by one of the defendants, if you find that any one of the defendants, individually has discriminated in price between different purchasers of frozen pies, either directly or indirectly, and if you further find that such discrimination was reasonably likely to substantially lessen competition, and tend to create a monopoly in any line of commerce, and further if you further find that such differentials in price did not merely make due allowance for differences in cost of manufacture, sale or delivery, resulting from differing methods in which commodities are sold or delivered to purchasers, and if you

further find that the defendants' price discriminations, if any, were not in response to changing conditions affecting the market or marketability of the frozen pies, then you may find that such defendant has violated the law.

If you find that any defendant has so violated the law, you must then consider the defense which involves good faith meeting of an equally low price of a competitor, which is a defense I will tell you about presently.

I want to tell you something more about Section 2(a) of the Clayton Act about which I have been speaking, and that deals with the individual's separate violations, if any, which are charged by the plaintiff against each of these defendants.

As you will recall, Subparagraph (a) of Section 2 of the Clayton Act makes it unlawful for a seller to discriminate in price between different purchasers of goods, where such discrimination in price may be substantially to lessen competition or to tend to create a monopoly, or to injure, destroy, or prevent competition with the person who grants such discrimination, all subject to the provisos and to the defense which I have previously mentioned.

That section, when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price cutting tactics, which had an adverse effect upon the competitive position of other sellers.

[fol. 1236] Now, I want to explain to you the meaning of the words "to discriminate in price." That just means selling the same kind of goods cheaper to one purchaser than to another. A price discrimination, within the meaning of Section 2, Subparagraph (a), of the Clayton Act is merely a price difference.

I want you to understand that the Act does not render every price discrimination unlawful. It only makes unlawful price discriminations which have the reasonably probable effect of eliminating or substantially lessening competition or tending to create a monopoly. And, of course, such discriminations are not unlawful if they make only due allowances for differences in the cost of manufacture, sale, or delivery, resulting from different methods or quan-

tities in which such commodities are delivered or sold to the purchaser, nor are such discriminations unlawful if they are the result of price changes from time to time in response to changing market conditions or changes in the marketability of the goods.

The gist of the statute is, of course, that the effect of the price cutting, if it does exist, must be such that it can be said that its effect may be a substantial lessening of competition, or that it may tend to create a monopoly.

You will recall the words "may be" and also the word "tend" in this statute, which means it doesn't have to actually lessen competition. It is sufficient if there is reasonably likely to be a substantial injury to competition among sellers of frozen pies in the Utah area.

In deciding whether or not any of the defendants have individually violated the law, as I have just explained it to you, you may take into consideration, ladies and gentlemen of the jury, the following matters:

You may consider evidence that any defendant intended to lessen competition in the frozen pie business or intended to create a monopoly in it. And in that connection you may consider evidence as to whether or not such defendant has deliberately and consistently sold pies at a loss in areas in which the plaintiff also sells pies. You may consider whether or not geographic price discriminations were employed by any of the defendants for predatory ends. You may also consider the size of each defendant and its economic power or lack of it in the area in which it operates. [fol. 1237] As I have already mentioned, there is a defense to the price discrimination which is made unlawful by Section 2, Subsection (a) of the Clayton Act. That defense is available to an individual defendant, but in order for an individual defendant to take advantage of it, such individual defendant must prove by a preponderance of the evidence—and that means the greater weight of the evidence—that he is entitled to it; that is, that after the plaintiff has shown what at first blush appears to be a vio-

lation of Section 2, Subsection (a), of the Clayton Act, the defendant may then show that he is entitled to the defense provided by Section 2, Subsection (b), of the Clayton Act, which reads, in pertinent part as follows:

"Nothing herein contained—" and that means in Section 2, Subsection (a).

"—shall prevent a seller from rebutting a prima facie case made by the plaintiff by showing that his lower price, or the furnishing of services or facilities to any purchaser or purchasers, was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

I want you to note, ladies and gentlemen, that while a seller is permitted to meet the competition, the good faith meeting of competition does not permit it to cut local prices until its competitor has first offered lower prices, and then it can go no lower than to meet those prices.

If it goes further, it must do so likewise with all other customers or make itself liable to all of the penalties of the Clayton Act, including liability for damages. In other words, the law permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further.

You will notice that the statute uses the words "good faith." Meeting the equally low price of a competitor would not be a defense to a price discrimination otherwise illegal under the instructions which I have given you, if the individual defendant claiming the benefit of that defense knew that the price which it was meeting was itself an unlawful price.

I instruct you that if you find that any individual defendant, any one of them, acting independently, made plans to sell frozen pies in the Utah area at a loss, before it knew what the prices of its competitors in that area were going to be, then the good faith meeting of competition defense is not available to that defendant.

[fol. 1238] I further instruct you that, in order to avail itself of the defense that it has lowered its prices only to meet an equally low price of a competitor in good faith, a defendant must prove by a preponderance of the evidence that its lower price was made in response to an individual competitive demand and not as a part of the seller's pricing system.

If you find that any of the defendants has violated the antitrust laws either individually or by conspiring, and, ladies and gentlemen, if you further find that any such defendant is not entitled to the defense which I have explained to you, meeting the equally low price of a competitor in good faith, you must then consider whether or not the violation of the antitrust laws which you have found proximately caused the injury to the plaintiff.

You may not return a verdict for the plaintiff unless you find that the plaintiff has been, in the words of the statute, injured in his business or property by reason of something forbidden in the antitrust laws which I have been instructing you about.

You will note that the words of the statute which I have quoted to you mentioned both injury to business and injury to property. The injury must be, as the statute says, by reason of a violation of the antitrust laws, that is, the injury must be proximately caused by the violation.

Now, I have used the term "proximately caused." By "proximate cause," as used in these instructions with reference to impact, or the illegal conduct upon the plaintiff and damage, is meant that that direct and efficient cause, which, without the intervention of any independent intervening cause, produces the impact or damage in question.

Thus the proximate cause of damage is the direct cause thereof without the intervention of an efficient, independent reason which would have produced the result anyway. And damages proximately resulting from a conspiracy, if any there are, are those which result proximately from such conspiracy and not those which may result from some other independent cause or circumstance.

By "direct and proximate cause" is meant direct, competent, producing cause.

[fol. 1239] The statute speaks of injury to the plaintiff's business or property. In considering whether or not plaintiff has been injured in its business, you may consider whether or not it would have been able to sell the same number of pies for a higher price in the absence of the violation. You may also consider whether or not the plaintiff would have been able to sell more pies at profitable prices in the absence of violation.

In considering whether or not plaintiff has been damaged in its property, you may consider whether or not the good will of its business has been injured as a proximate result of a violation or violations of the antitrust laws.

The good will of a business is property for the purposes of the statute.

Now, as I have said, plaintiff has charged the defendants with both individual violations of the antitrust laws and with a conspiracy, acting together, to violate the antitrust laws.

Let me briefly summarize what I have already told you in somewhat more detail about what you must find before you may assess damages in favor of the plaintiff and against any defendant.

First you must find that plaintiff has proved by a preponderance of the evidence that such defendant has violated the antitrust laws, either individually or by joining in a conspiracy which violates the antitrust laws.

Then, insofar as you may have found that any defendant has violated the antitrust laws individually, you must find that such defendant has not shown by a preponderance of the evidence that it was in good faith meeting an equally low price of a competitor.

Secondly, you must find by a preponderance of the evidence that a defendant's violation of the antitrust laws, if any there be, proximately caused an injury to the plaintiff.

If the plaintiff has failed to establish any one or more of these propositions by a preponderance of the evidence, you

should return a verdict against the plaintiff and in favor of the defendant or defendants concerning which there has been such failure.

[fol. 1240] If the plaintiff, by a preponderance of the evidence, has established each and all of the propositions, and if an individual defendant has not proved his defense by the preponderance of the evidence of meeting competition in good faith, you should return a verdict in favor of the plaintiff and against the defendant or defendants concerning which said propositions have been so established by a preponderance of the evidence. And in such event you should assess against said defendant or defendants plaintiff's damages in accordance with the rules on the measure of damages which I shall give you hereafter.

The plaintiff need not prove its damages to a mathematical certainty. In this type of case the law permits you to make a reasonable estimate or approximation of plaintiff's damages, based upon all of the relevant economic data which has been placed before you, either in the form of documents or oral testimony.

The plaintiff would not be entitled to damages which are merely speculative, remote, or uncertain, but you may award damages based upon a reasonable approximation in view of the evidence, even though those damages cannot be determined with mathematical accuracy or certainty.

If, in fact, plaintiff has been deprived of business by violation of the antitrust laws, by that same token it may have been deprived of the ability to prove exactly what would have happened.

The violators, if any there be, may not take advantage of their own wrong by claiming that damages are too uncertain, if the evidence upon the question of damages reasonably permits approximation of damages based upon reason and the evidence received here in open court.

You should not look to any single element or any single fragment of evidence, but should weigh all of the evidence throwing light upon the extent of damages if any.

The purposes of damages in an action of this kind, ladies and gentlemen, to be fixed by a jury in an antitrust suit, if damages are proper and you should so find, is to put the plaintiff back in as good a position as he would have been in if there had not been any violation and if the resulting injury, if any, had not occurred.

So, if you fix damages, you should return them in such sum as you find were the actual damages without increase [fol. 1241] or diminution. If the fact of damages to the plaintiff has been established by a preponderance of the evidence, then you may determine the amount of the damages on the basis of the best evidence available and may act upon probable and inferential proof, as well as direct and positive proof.

If the plaintiff recovers, it is entitled to an award based upon its loss, if any, of profits which it otherwise would have made if it were not for the impact of the violation, as compared with what it actually did make under the conditions which prevail. In other words, the plaintiff, if it is entitled to recover, would be entitled to recover the amount by which its profits were reduced by the violation of the antitrust laws, if and to the extent you find there was such a reduction.

In determining the amount of plaintiff's damage, if you find under the instructions that I have given you that plaintiff is entitled to damages, you may consider the testimony of Mr. Rigby and the testimony of plaintiff's accountant Mr. Caldwell. You may also consider the exhibits which Mr. Caldwell has prepared and which have been admitted into evidence. T e testimony of both of these witnesses and the exhibits are evidence in this case which you may consider.

The burden of proof, ladies and gentlemen, is upon the plaintiff to prove each of the elements of its case by a preponderance of the evidence, and that means simply the greater weight of the evidence. Insofar as the plaintiff has charged these defendants with individual violations of

the antitrust laws, it must prove its case against each defendant separately by a preponderance of the evidence. That is, it must prove as to each defendant separately that that defendant charged prices in the Utah area which were lower than the prices which it was charging at the same time in other parts of the country.

Plaintiff must also prove by a preponderance of the evidence that that price differential was reasonably likely to substantially lessen competition or tend to create a monopoly in the frozen pie business in the Utah area.

The plaintiff must also prove by a preponderance of the evidence that the difference in prices was not justified as making only due allowance for differences in the cost of manufacture, sale, or delivery of defendants' pies.

[fol. 1242] Plaintiff must also prove by a preponderance of the evidence that price differences were not merely price changes from time to time in response to changing conditions affecting the market for, or the marketability of, that defendant's pies.

Plaintiff must also prove by a preponderance of the evidence that the difference in prices had an impact upon its business and that the difference in prices proximately caused injury to the plaintiff's business or property.

Finally, plaintiff must prove the extent of its damages by a preponderance of the evidence.

Insofar as plaintiff has charged the defendants with conspiring together, it must prove its case by a preponderance of the evidence. It must prove by a preponderance of the evidence the existence of a combination to act cooperatively to injure or destroy the plaintiff, that the combination proximately caused injury to plaintiff's business or property, and the amount of plaintiff's damages.

The burden of proving the defense of meeting the equally low price of a competitor in good faith, however, is upon the defendant and not the plaintiff. Of course, if plaintiff has not proved that the defendant has violated the law, then there is no need for that defendant to prove anything.

If, however, plaintiff has proved that a particular defendant had individually violated the law, that defendant may nevertheless attempt to prove the good faith meeting of competitive defense.

If an individual defendant attempts to prove that defense, the burden of proving the defense, again by a preponderance of the evidence, falls upon that individual defendant.

It must prove by preponderance of the evidence that it did no more than meet a price set by a competitor. It must also prove by a preponderance of the evidence that it acted in good faith. As I have instructed you, if you find that a defendant has joined in a conspiracy to fix the prices of frozen pies in the Utah area, that defendant is not entitled to prove the good-faith meaning of competition defense at all, by any amount of proof.

By preponderance of the evidence is meant the greater weight of the evidence from the standpoint of its con- [fol. 1243] vincing nature. The quality of the evidence which, when appraised and weighed in opposition to contrary evidence, is more convincing as to its truth and effect; that quality of evidence which establishes to the reasonable mind that the truth of a given proposition is more probable than not.

To establish something by a preponderance of the evidence does not require proof beyond a reasonable doubt, as in criminal cases.

Now, I emphasize that, and ask you to pay strict heed to it. You have been sitting here in our court for sometime, and you've heard some criminal cases. And you heard me charge that the United States must produce evidence which satisfies your minds beyond a reasonable doubt. That isn't true here. This isn't a criminal case at all. This is a civil case. And the burden of proof does not require the party upon whom it rests to produce evidence which convinces your minds beyond a reasonable doubt. All that is necessary is that the party having the burden of proof produce evidence which convinces your minds by a fair

preponderance of the evidence, meaning the greater weight of the evidence.

If the evidence is equally balanced on an essential element of the case, the burden of proof would not be sustained, since in that event the proposition would not be established by a preponderance, or the greater weight of the evidence.

In determining the greater weight of the evidence, or its preponderance, the number of witnesses is not controlling nor is the fact that the evidence is offered by the plaintiff or by the defendant, or is brought out on direct examination or cross-examination, or is represented by documentary evidence, or not.

As I previously instructed you, you may return a verdict against one or more of the defendants in several different ways, depending upon the violations, if any, the defenses, if any, the injury and impact, if any, and the damages, if any, which you find with respect to any defendant or any two or more defendants.

I will now explain to you, ladies and gentlemen, how you should return your verdict. I'm going to talk about the verdicts, and I want you to pay strict heed to this.

If you find any of the defendants individually guilty of the violation of the antitrust laws, and without defense, and further find that such individual defendant's violation of the antitrust laws has injured the plaintiff, you should return a verdict against each of such individual defendants, [fol. 1244] individually, stating the amount of the plaintiff's damages which flows directly and proximately from that particular defendant's violation of the antitrust laws.

If you find that two or more of the defendants have individually violated the antitrust laws, and are liable in damages to the plaintiff, under the instructions which I have given you, then you should state separately the damages flowing directly and proximately from each such defendant's violation of the antitrust laws.

If you find that two or more of the defendants have conspired together to violate the antitrust laws, and the

violation has been the direct and proximate cause of an injury to the plaintiff, then you should state the damages resulting from such violation in a single sum, which of the damages that shall be assessed against all the defendants which have joined in the conspiracy. And you shall not attempt to separate those damages as between the defendants.

If you find, under the instructions which I have given you, that two defendants have conspired together, and that they are liable to plaintiff for damages, and further find that a third defendant has individually violated the antitrust laws, and is liable for damages, then you should assess damages against the two defendants which have conspired together, and should not attempt to segregate the damages as between the conspirators, but you should assess the damages proximately flowing from the violation of the antitrust laws by the third individual defendant separately.

Now, I will explain that a little further for you when I get to the form of the verdict itself.

I have instructed you that price differences are not unlawful unless they are likely to cause substantial injury to competition among sellers of frozen pies in the Utah trading area. I have further instructed you that price differences are not unlawful so long as they make no more than due allowance for differing costs of manufacture, sale or delivery of frozen pies, or in response to changing conditions affecting the market or marketability of frozen pies.

I have further instructed you that if any defendant shows that a price difference which would otherwise be unlawful was actually the result of its having sold pies at a low price in good faith to meet the equally low price of a competitor, then that would be a complete defense.

[fol. 1245] I now want to tell about certain circumstances which are not a defense to selling pies at different prices in different places. It would not be a defense that selling pies at different prices in different places might contribute

to the over-all profits of a defendant's business. The law does not permit profits to be made in this way, if the difference in prices is otherwise unlawful under the instructions I have given you.

You are also instructed that while you may award damages, if any to plaintiff for any unlawful acts, if any, committed before the date of the filing of the complaint—which was September 8, 1961—you may not award damages or post-complaint losses unless they were a natural and proximate result of events occurring before the complaint.

You may not award damages for losses occurring as a result of acts occurring after the complaint was filed.

Now, we turn to another subject. I have been talking about the plaintiff's claims against the three defendants here. I now tell you that the Continental Baking Company has filed what we call a counterclaim against the plaintiff, the Utah Pie Company, in which Continental has claimed damage proximately caused it by alleged illegal acts of the plaintiff, in violation of the antitrust laws, and has sought an injunction against continuance of such discrimination.

Briefly stated, the defendant's claim against the plaintiff consists of a claim that the plaintiff violated the antitrust laws by charging discriminatory prices, granting discriminatory allowances and rebates for frozen fruit pies of like grade and quality to competing customers in the plaintiff's trading area, and by charging discriminatory prices as between the Spokane, Washington market and the Salt Lake City market.

With respect to this counterclaim, the Defendant Continental Baking Company bears the same burden of proof as I have explained to you previously the plaintiff bears in its claim against Continental and the other two defendants.

Continental Baking Company must prove by a preponderance of the evidence, as that phrase has been defined, that the plaintiff discriminated in price as alleged, and that the alleged discrimination had the prohibited effects on competition as I have previously explained to you in connection with plaintiff's claim.

[fol. 1246] The instructions I have previously given you with respect to plaintiff's claim against Continental are equally applicable to the claim by Continental against the plaintiff insofar as they relate to proximate cause and injury.

Continental has also charged that plaintiff has monopolized, or attempted to monopolize the Salt Lake City market for frozen fruit pies, to the injury of Continental. In respect to the charge that the plaintiff has monopolized the market for frozen fruit pies, you are instructed that Continental must satisfy you, by a preponderance of the evidence, that in the years involved in this action plaintiff has had either the power to set its own price, substantially immune from competitive forces, or that plaintiff has had the power to exclude competition from the relevant market, or both. In respect to the charge that plaintiff has attempted to monopolize the market for frozen fruit pies, you are charged that the elements of this offense, as to which Continental must satisfy you by a preponderance of the evidence, are (1) That plaintiff had a specific intent to monopolize the market as I have described; (2) That plaintiff performed the acts it is charged with; and (3) That there was a dangerous probability that plaintiff would succeed in its attempts.

I shall explain what I mean by "specific intent to monopolize." I mean that for you to find that the plaintiff attempted to monopolize the trade or commerce in frozen pies in the Salt Lake City area, it is not enough that you find that the plaintiff intentionally performed the acts that plaintiff alleges constituted such an attempt. Rather, you must find that such acts were performed with the purpose of monopolizing or creating monopoly of such trade or commerce.

With respect to the claim in the counter-claim by Continental against the plaintiff, you are instructed that should you reach the question of damages, Continental must satisfy you by a preponderance of the evidence that it was, in fact, injured in its business or property. You are further

instructed that Morton has limited its claim—and by "Morton", I mean "Continental." Morton, you remember, is the subsidiary. It's the frozen pie division of the Continental Baking Company. You are further instructed that Morton must satisfy you by a preponderance of the evidence that it was, in fact, injured in its business or property. You are further instructed that Morton has limited its claim for damages to what are called nominal damages, that is one dollar. Therefore, while in order to find for Morton you must find that Morton was damaged in its business or property, you need not calculate the full amount, for your actual award of damages may be for only one dollar.

[fol. 1247] Now, I am going to turn my attention, ladies and gentlemen, to the form of the verdict.

As you know, plaintiff has charged these defendants in two ways, both with conspiring together to violate the antitrust laws—that's the conspiracy charge—and with violating the antitrust laws individually and independently, separately. You shall return, ladies and gentlemen of the jury, a separate verdict on each of these. If you should find that any defendent has violated the antitrust laws both individually and also by participating in a conspiracy to violate the antitrust laws, and I don't for a moment want to suggest to you that you should or should not so find—this is your prerogative, it is not mine. And I am not suggesting anything at all about whether you should or should not return a verdict, or in any such fashion you should return it. I don't for a moment want to suggest that you should or should not find anything here in this case. I say, if you should find that any defendant has violated the antitrust laws, both individually and also by participating in a conspiracy to violate the antitrust laws, then you should return separate verdicts for plaintiff, awarding plaintiff its full damages under each violation.

Plaintiff's damage evidence purports to show the individual damages charged to each defendant for plaintiff's claim under the price discrimination statute, and the dam-

ages charged to all defendants for plaintiff's claims under the conspiracy statutes. You should make your findings on each of the claims independently, as though the other claims were not even in the case. You should not try to apportion the total damages between the conspiracy claim, on the one hand, and the price discrimination claims of each individual defendant on the other. Award damages on each as though each claim was the only one before you. I assure you that after your verdicts have been returned, judgments which I will enter upon them, if they should be in favor of plaintiff, will provide that plaintiff will not be paid twice for the same injury, if any problem in that connection should arise. You should, of course, return a verdict against each defendant only if you are satisfied that that defendant violated the antitrust laws and that the plaintiff was injured as a result of that violation. Any damage you assess against any defendant for price discrimination, or against two or more defendants for conspiracy, must have been caused by the violation, if any, which that defendant committed, or by the conspiracy, if any, which two or more defendants committed. And you must be careful, ladies and gentlemen, in analyzing the plaintiff's damage evidence, not to assign to one defendant the damages which it did not cause or which the evidence shows resulted from the acts of another de- [fol. 1248] fendant. If you conclude under these instructions that there have been violations of the antitrust laws relating to price discrimination, and to conspiracy, and that the violations had an injurious impact upon the plaintiff, and by the extent of its damages can be approximated from the relevant economic data admitted into evidence, you shall assess all of the damages resulting from price discrimination and all of the damages resulting from conspiracy. Of course, none of these instructions relating to damage are applicable at all unless you first find that defendants have violated the antitrust laws as I have explained them to you.

Now, you will take with you into the jury room, ladies and gentlemen, four sheets of paper. I am going to give

them to you. Four sheets of paper. By that, I mean four verdicts. Three of those sheets of paper will be three proposed verdicts for the individual defendants. There will be one proposed form of verdict for the Continental Baking Company defendant, there will be another proposed form of verdict for the Pet Milk Company defendant, there will be a third proposed form of verdict for the Carnation Company defendant.

Now, on each of those sheets of paper, on each of those proposed forms of verdict, you will have a choice of two statements. You should strike out the statement which, after your deliberations, and upon your arrival at a judgment, or from the facts in this case, you should strike out the statement which does not apply to the defendant in question. You should do this on each of the three sheets that is for each individual defendant. If you find for plaintiff against any individual defendant, you should write in the full amount of plaintiff's damage proximately caused by that defendant's individual violation of the antitrust laws on the sheet for that defendant, in the space provided.

The fourth sheet is for your verdict on plaintiff's charge that defendants have conspired with each other. Again, you have a choice expressed on the face of the verdict, as to each defendant, as to whether it did or did not participate in a conspiracy to violate the antitrust laws.

If you find that two or more of the defendants have conspired together to violate the antitrust laws and that the conspiracy has proximately caused injury to the plaintiff, then you should write in the total amount of damages proximately caused by the acts of all of the conspirators in furtherance of the conspiracy in the place in the form of verdict provided.

[fol. 1249] Now, I have in my hand the forms of verdict I am going to send into the jury room with you, and I will take first the verdict that has to do with the conspiracy charge of the plaintiff against all of these defendants. I am going to read it to you and explain it as we go.

"We the jury duly impaneled in the above-entitled case finds as follows: The following defendants have conspired to fix the prices at which they should sell frozen pies in the Utah trading area and thereby caused plaintiff damage."

Now, in parentheses, brackets, right here on the face of the verdict, after what I have read you, I send in a little note to you, which says: "Strike out the name of any defendant which has not conspired, or leave the statement as it is if you find that the three defendants have conspired."

And then, as you can see, ladies and gentlemen of the jury, we have the defendants listed, Carnation Company, Continental Baking Company, Pet Milk Company, and a blank line with a dollar sign at the beginning of it. And up over that blank line is a statement, "Damages proximately caused by the conspiracy."

Now, ladies and gentlemen of the jury, what we mean by that form, if I may further explain, is this:

"We the jury duly impaneled in the above-entitled case find as follows: The following defendants have conspired to fix the prices at which they would sell frozen pies in the Utah trading area and thereby caused the plaintiff damage."

Now, if it is your verdict, following the charge, the particulars of which I have already discussed with you, that all three participated in a conspiracy to the injury of the plaintiff, then you just leave the names as they are and you fill in the amount of damages which, after deliberating upon the case, you have determined the plaintiff should recover.

Now, on the other hand, if it is your judgment that one or more of the named defendants did not conspire to fix prices at which they would sell frozen pies in the Utah trading area and thereby caused the plaintiff damages, you should strike out the name of that defendant or defendants.

That is the form of verdict on the conspiracy charge. [fol. 1250] Now, there are three other verdicts. Each one of these applies to each individual defendant. I will take

them up in the order in which their cases were put on here.

This form of verdict says: "We the jury impaneled in the above-entitled case find as follows:"

I have in my hand the one applying to the Continental Baking Company now.

"Defendant Continental Baking Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere in violation of Section 2 of the Clayton Act and thereby proximately caused plaintiff damage in the amount of—" and there is a place to fill in the damage.

Now, if it is your judgment that that is so, you fill in the damage, and then you strike out the next statement, which is, "Defendant Continental Baking Company has not independently and individually violated Section 2 of the Clayton Act."

Now, if it is your judgment, on the other hand, ladies and gentlemen of the jury, that the defendant Continental Baking Company did not do the things mentioned in the first paragraph, then you should strike out the first paragraph and leave the little two-line one which follows it. And there is a little note to you there, which says, "Strike out the statement which does not apply."

Now, there is one for each one of the defendants like that.

The first form of verdict is on the conspiracy charge against all of them, charging that they together combined and conspired and agreed to the injury of the plaintiff.

These three apply to the charge of the plaintiff that acting individually and separately and independent, one from the other, they discriminated in the price which the corporation charged for frozen pies in the Utah trading area and the prices which it charged for frozen pies elsewhere in violation of the Act and thereby caused, proximately caused, plaintiff damage in the amount set forth.

Now, if you have any difficulty when you get to the point of filling in the verdict, if you will send a note out, I will [fol. 1251] have you come in again and explain it to you. If you come in in that fashion, I don't want you to tell me anything about your deliberations at all, how you stand, for or against what propositions, but this involves four forms of verdicts on the plaintiff's case, and it involves another one on the defendant Continental Baking Company's counterclaim against the plaintiff. And that might get a little confusing for you. And I don't want you to act while you are confused at all. Come back here and the Court will assist you here in the courtroom.

Now, on Morton's counterclaim the form of the verdict is similar, that is, you are to strike out the statement which does not apply. And the verdict says:

"We the jury duly impaneled in the above-entitled case find as follows: Plaintiff Utah Pie Company has discriminated in the prices which it has charged to competing customers for frozen pies in the Utah-Idaho trading area in violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act and thereby proximately caused Continental Baking Company damage, for which Continental is awarded one dollar."

The second paragraph is: "Plaintiff Utah Pie Company has not violated Section 2 of the Clayton Act by discriminating in prices among competing customers."

Now, when you have formed a judgment beween those two propositions, you strike out the one which does not apply.

Now, ladies and gentlemen of the jury, you are the sole judges of the evidence in this case, and you are also the sole judges of the credibility of the witnesses. And by "credibility of the witnesses" I mean simply whom you will believe, and what you will believe and where the ultimate truth in this case lies.

Ladies and gentlemen of the jury, there is a solemn obligation resting upon you all, and that obligation is to do justice between the parties in this lawsuit. There is no higher obligation that man ever assumes.

I don't want you to arrive at your verdict hastily. I want you to examine this evidence, all of it, and consider it as a whole in arriving at your verdicts. And when you have arrived at your verdict, you should feel these verdicts out as I have indicated. They should be signed by the foreman of the jury and returned here into court.

[fol. 1252] In order to arrive at a verdict, all of you must agree. I don't mean to say to you that you may not disagree, if that be the state of your minds, but in order to return a verdict, either for or against the plaintiff or for or against the defendants, or one of them, in this case, you must arrive at a unanimous judgment about the matter.

When you retire to the jury room, ladies and gentlemen, select one of your number foreman.

Swear an officer.

* * * * * * *

EXCEPTIONS TO CERTAIN INSTRUCTIONS

Mr. Lamb: If your Honor please, as counsel for the Pet Milk Company, I would like to respectfully take exception, first, to the fact that all of Pet's pies are of like grade and quality. It is true that the Pet-Ritz Pie and the Bel Air pie are of like grade and quality. However, the Swiss Miss pie is not of like grade and quality in comparison to the Pet-Ritz and Bel Air pie. The reason that it is not is because it first is a 20-ounce pie, as distinguished from being a 24-ounce pie, and, secondly, that the formula and the quality of the fruit and the crust of the pie are different from the quality of the Bel Air pie and the Pet-Ritz pie.

Secondly, I take exception to the instruction which says that if the defendant Pet has planned a loss, that the good faith meeting of competition defense is not available. The law allows the good faith meeting of competition, provided

that a competitor has charged a lawful price which is lower than that of the Pet Milk Company and the Pet Milk Company, if it has satisfied itself that that price is a lawful price, may meet it in good faith, irrespective of any profit or loss that might come to the Pet Milk Company, as a result of making a sale.

* * * * * * *

Mr. Lamb: The second point that I make, your Honor, is that the instruction which says that the good faith meeting of competition defense of Section 2 (b) of the Clayton Act is not available if the defendant Pet had a planned loss. [fol. 1253] It is my contention, your Honor, that there is nothing in the Robinson-Patman Act in any section, or in the Clayton Act, Sections 2(a) or 2 (b), which deals with the question of profit or loss. It merely deals with the question of differences in price or discriminations in price. Similarly—

The Court: Let's talk to this one.

Mr. Alioto: Would your Honor like me to respond to each one?

The Court: Yes.

Mr. Alioto: Again, I think it is a matter of interpreting language again. As counsel has stated, if you find out that a competitor or anybody else is charging a lower lawful price, you may meet that in good faith, even though that particular price happens to be at a loss. I don't dispute that legal proposition. But that isn't what the instruction means, as I understand it.

If there is any ambiguity, it ought to be cleared up. What this instruction means is that before you know about a competitive price you are supposed to meet—you are supposed to have some knowledge about that, acquire that knowledge, and then respond to it, but before you have any of that knowledge, if in advance you project a program which sells at a loss in a particular area, then you can't say that you, in good faith, have met anything, because you have acted in advance of knowing anything.

And this is the distinction, now. I think certainly on that basis there's no problem.

Mr. Lamb: Well—

Mr. Alioto: But I will agree with Mr. Lamb that if, without having projected in forecast losses, without having done that—which of course in this case they did—if they hadn't done that, and they came to the market and they found a lawful price of a competitor, and they met that price, then meeting that price, even though at a loss, is a good defense.

But our point is, that before you find out anything about anything, if in advance you project losses, which happen to resolve in a discriminatory price, you can't say that you are in good faith responding to anything.

Mr. Lamb: Your Honor please, I take definite exception to that.

[fol. 1254] Mr. Alioto: There's an element of evidence to that.

Mr. Lamb: I take definite exception to that, because it is my contention that the Robinson-Patman Act does not deal with profits or losses. It deals with differences in prices, or discriminatory prices. And the test is the price itself.

The Court: How can you say they are acting in good faith to meet a competitive situation if you project the losses, which is the thing complained of, before you know anything about it.

Mr. Lamb: Well, your Honor please, that of course is a contention of the plaintiff.

The Court: Yes.

Mr. Lamb: But the contention of the defendant is, the Defendant Pet, is that if in the operations of the Pet Milk Company, in its distribution of frozen pies, that it was introducing a new product on the market, and during that period in which it was introducing a new product it planned certain very expensive promotions in advertising and television shows, which added to the burden of the Pet Milk Company, and that for good business reasons the comptrol-

ler of the Pet Milk Company gave to management the position that they would be in if they sold the product at the selling price, which they pre-determined to be the selling price in a particular area, or an averaging of the selling price in all areas, in the case of Pet, the sales manager, in advance of the year's planned production and distribution, would furnish the comptroller with this average selling price, and from that point the Pet Milk Company could determine if they were going to spend a million dollars for television, for cooperative advertising, for in-store demonstrations, for coupons, and for all of those things which caused consumer acceptance for frozen pies, that that had nothing to do with any allegation with respect to a violation of Section 2(a) of the Robinson-Patman Act.

Our contention is that after this period of introduction ceased, that the Pet Milk Company brought its profit position into a net profit position.

Now, I further contend, your Honor, that the instruction which says that in the event that there might be a contribution to profits—speaking of course at the gross profit level—that that also vitiated the defendant's right to the use of [fol. 1255] the good-faith-meeting-of-competition defense is not a part of the law. Nowhere in the Robinson-Patman Act, or the Clayton Act, is there found any reference to profits or loss. The prices were not set by the budget to be inflexible during a year, but were set from time to time to meet the specific competitive situation that the Pet Milk Company found in the various markets throughout the United States where frozen pies were being distributed.

The Court: Well, what do you say to that?

Mr. Alioto: First of all, if your Honor please, so far as the second is concerned, all the Court's instruction is that you can justify a discriminatory price, if it is a discriminatory price, on the ground that it somehow contributes to profit. I think that is true. I don't think there is any problem about that. But on this other, on this other point he raises, it might be well to have some clarification. Because

if the jury got the same impression Mr. Lamb got, which I submit is not really in the language—it might be argued they may have that impression—that is this: if you in good faith determine that there is a lower price than yours, then you may meet that price, even though it results in a sale at a loss.

Now, the only thing we intended by the instruction was, that if you actually, if you plan and budget and prognosticate the discriminatory price in advance in connection with a program which involves selling at a loss, that that militates against the notion that you in good faith went into the market, found a lower price, and then met it.

Now, that is all we meant to say in that instruction. However, if it can be contended that the jury might interpret that to mean that the meeting, that the price that you use to meet competition must be at a profit, there could be a problem there.

The Court: Yes, I see.

Mr. Alioto: Therefore, I'd like to get that portion straightened out.

The Court: I think so.

Mr. Alioto: But the instruction is still correct. That if the discriminatory price was set as part of a program—

[fol. 1256] The Court: Well, why don't you write out what you want me to tell the jury?

Mr. Alioto: All right, if your Honor please.

The Court: I am going to call them back, so I will take care of both of these things.

Now, what else do you have?

Mr. Lamb: That's all I have, your Honor.

The Court: Very well.

Mr. Schafer: Your Honor, I just have a few exceptions.

Your Honor, I think that in respect to the charge as relating to the conspiracy, the jury needs a definition of what the conspiracy is which is charged. And the Court's language was—

The Court: I comment on the evidence.

Mr. Schafer: No.

The Court: You can take your exception to that. You take your exception.

Mr. Schafer: I just thought—

The Court: I don't want to argue you out of your exceptions. You take whatever exceptions you want to.

Mr. Schafer: Yes.

The Court: But I wouldn't call them back and amplify the definition of conspiracy as it relates to the facts in this case. I always try to keep myself out of that sort of situation.

Mr. Schafer: Your Honor, I wasn't suggesting that. I just simply wanted to state that I thought that conspiracy should be defined as going to lower the prices.

The Court: Why don't you take your final exception on whatever grounds you want?

[fol. 1257] Mr. Schafer: All right.

Then, your Honor, I may have missed it, but I thought there was language in your Honor's charge that said that if there was evidence from which the jury could find that certain events may have permitted meetings, they could find a conspiracy. And I would except respectfully to that charge, if that was your Honor's intent. I thought the language read that way.

The Court: Well, I am not going to address myself to that.

Mr. Schafer: Your Honor, in respect to defining the purposes of the Patman Act, I understood the Court to say that the Act was aimed at preventing an adverse effect upon competitors. And I will respectfully except to that charge, your Honor, if that's what the statement was. As I conceive the Act, it's aimed at an adverse effect upon competition generally, and not just upon one or two competitors.

The Court: Well, it's written out. I read that thing, you know. So we've got it.

Why don't you turn to it, and let's see what we said?

Mr. Schafer: Well, I don't have a copy, your Honor. I'm sorry.

The Court: "Adverse effect." Let me see that.

You've got it Wayne, haven't you? What I read?

The Clerk: I have the instructions here.

The Court: Yes. Let me see it.

Mr. Schafer: It was in the section in which the Court was defining the purposes of the Patman Act. I don't know what number the charge is.

The Court: Yes. This won't be hard to find. Where I used the word "adverse."

Mr. Schafer: Yes.

The Court: Now, that was a word I introduced. I can [fol. 1258] find that and tell you. You don't need to worry about that. (Examining documents)

Now, here's what I read. I think I read it this way:

I said: "As you will recall, that is the paragraph which makes it unlawful"—my reference to that is back to sub-paragraph (a) of Section 2 of the Clayton Act—"as you will recall, that is the paragraph which makes it unlawful for a seller to discriminate in price between different purchasers of goods where such discrimination in price"—and I quote "may be substantially to lessen competition or"—and quote again "to tend to create a monopoly, or to injure, destroy, prevent competition with any person who grants such discrimination."

Now, there is something else I state, too. Let's see if I can find that.

Mr. Schafer: Wasn't there a passage where your Honor was defining—

The Court: Where I used the word "adverse."

Mr. Schafer: And you were talking about the enactment of the Patman Act, as I recall it, your Honor. You were speaking to the jury about the purposes of the Patman Act.

The Court: All right. I will find it for us. Because that's in pencil. It's my own language.

Yes, here it is.

Just goes on from where I was. Then I add: ". . . or tend to create a monopoly, or to injure destroy, or prevent

competition with a person who grants such discrimination, or subject to the provisos and to the defense which I have previously mentioned. That section when originally enacted as part of the Clayton Act in 1914, was borne of a desire of Congress to curb the use by financially powerful corporations of localized price cutting tactics which had an adverse effect on the competitive position of other sellers."

Now, that's the language I read.

And I changed your request, Mr. Alioto. You had the "which had gravely impaired."

[fol. 1259] Now, I thought "gravely impaired" departed from the statute.

Mr. Alioto: Yes.

The Court: "Which may be substantially to lessen competition or to tend to create a monopoly." And when you say "gravely impair," I thought we might be inviting some difficulty. So I put instead "which had an adverse effect on the competitive position of other sellers."

I didn't say "upon the competitor."

Mr. Schafer: I may have misunderstood your Honor. I'm sorry.

Mr. Alioto: This statement, if your Honor please, is taken almost verbatim from Chief Justice Warren's—

The Court: Anheuser.

Mr. Alioto: (Continuing)—Gulf Case.

The Anheuser Case.

The Court: Anheuser-Busch.

Mr. Alioto: Yes. Almost verbatim from that. And I give a reason for enactment of the legislation. I don't think there's any question but what that was the reason.

The Court: I know. But sometimes what is said in an opinion of the Supreme Court is very different from what the Court of Appeals or the Supreme Court's going to approve the charge to the jury. I've had a little experience in this department.

Mr. Schafer: Well, your Honor—

The Court: All right. Well, I don't think there's anything there. But you do whatever you want.

Mr. Schafer: I just want to note my exception for the record, that as I conceive the act, it's not concerned with the competitive situation of sellers, but at the competitive situation generally. The amount of competition in the market, and one particular seller's position in the market, is not of any consequence.

[fol. 1260] The Court: All right.

It wasn't any particular one's. All of them.

Mr. Schafer: Then I wanted to join, if the Court please, with Mr. Lamb's objection, or exception I should say, to the question of "If you've sold at a loss." And I didn't understand. I think that's been covered by—

The Court: Yes, we are taking care of that.

Mr. Schafer: Then, your Honor, I wanted to note an exception to the language to the effect, as I noted it in my notes, that "you've got, in order to set up a 2(b) defense that you cannot be quoting a price which is quoted to the seller's pricing system." And I didn't fully understand what was meant by that language. But, in other words, if it's the seller's pricing system to quote the same price to everybody in a local market, and that that's why he quoted a price in that market, I would deem that that does not vitiate the 2(b) defense.

And then, your Honor, I want to note, if I may, an exception to the language, as I noted it, that a conspiracy to fix the prices would vitiate the 2(b) defense.

Now, my exception is on this ground, that the jury would have to be told that the price which is being asserted as meeting an equally low price, that price itself was the product of a conspiracy, in order vitiate the 2(b) defense. That just a general finding of a conspiracy would not vitiate the 2(b) defense on one particular price. And take in particular, if you will, the Morton situation in June of '61, that unless the jury found that particular price to be the product of a conspiracy, I would not think that the

2(b) defense was destroyed in respect to that price quotation.

Mr. Alioto: I assume that the instruction carried with it the notion that if they found they were fixing prices in that area, in connection with this thing, it seems to me that that would vitiate any notion of good faith. Without saying it has to be that specific price, if there was a price-fixing plan in effect in the area. And I don't think that any price is fixed that would be in good faith. There's a conspiracy in operation.

[fol. 1261] Mr. Schafer: I don't think your Honor wants me to say any more. Do you?

The Court: I don't want you to do anything.

Mr. Lamb: I join Mr. Schafer in that exception.

The Court: All right.

Mr. Schafer: And then, your Honor, I wanted to note also my exception to the language I think Mr. Lamb discussed to the charge that it's not lawful under 2(a), a price is not lawful just because it contributes to profit. I thought that would be confusing to the jury. We have never asserted, of course, that that by itself made a price discrimination lawful.

The Court: Say that over again, will you?

Mr. Schafer: As I understood the Court, there was a charge to the effect that a price discrimination, or a price difference, was not lawful just because the lower price had an effect of contributing to the profits of the corporation. And, of course, we have never asserted that that had anything to do with establishing lawfulness of a price discrimination. And I thought that the jury would be confused by that charge, and would not understand really why it was there.

Mr. Schafer: That was in your Instruction No. 34, your Honor.

The Court: Was it? Let me take a look at it.

Mr. Billings: Last paragraph, your Honor, of 34.

Mr. Schafer: Last paragraph of 34.

The Court: All right. Let me look at it. All right, the last paragraph of 34 is—well, I will read 34 again:

"If you should determine that there was a conspiracy—"

Mr. Billings: Maybe we have the wrong number, your Honor. The number on the copy that was given me was 34.

The Court: Well, we had these all rearranged.

[fol. 1262] "I now want to tell about certain circumstances which are not a defense to selling pies at different prices in different places. It would not be a defense that selling pies at different prices in different places might contribute to the over-all profits of a defendant's business. The law does not permit profits to be made in this way, if the difference in prices is otherwise unlawful under the instructions I have given you."

Mr. Billings: I think our point is, your Honor, as I noted on my pencil marks, as you read that, that we have made no such contention, and this confuses the jury about the whole question about losses.

Mr. Alioto: If they make no such contention about it, there is no problem, it seems to me, but there has been a lot of conversation about certain prices we allege to be discriminatory. There have been a lot of conversations that they were contributions to profits so-called. And the jury could well get the impression from all of that evidence, which was really to another point, that somehow or other, if they felt there was a contribution to profit, that that would somehow make legitimate this discriminatory price, which, of course, isn't true. And I think the jury would be confused if that instruction were omitted.

Mr. Schafer: I think the Court was very clear on what the defenses were to the discrimination charge, and the jury would not be confused.

Mr. Alioto: It is important to tell what the defenses are not, too, in view of the great emphasis that was placed on this evidence.

The Court: All right, proceed.

Mr. Schafer: Now, your Honor, I am sure the Court does not want to discuss this, but on the problem of the special verdict we were discussing this morning, I think we still have our problem in the way these have gone to the jury.

The Court: You go ahead and take your exception.

Mr. Schafer: I just want to note my exception to that.

The Court: You want to except to what?

[fol. 1263] Mr. Schafer: I think we need, your Honor, special verdicts on each of the charges as against each of the defendants.

The Court: All right. You except to the Court's refusal of your request to submit the matter to the jury on special interrogatories, right?

Mr. Schafer: That is a better way of expressing it, thank you, sir.

The Court: It may not be any better.

Mr. Schafer: And then, your Honor, as I understand the rule, I have to note for the record my exception to the failure to grant certain instructions that I have requested, and I have a list of them here, and I thought, if it is acceptable, I could just dictate the lists of numbers of our instructions to the reporter. Is that the way to proceed on that?

The Court: Surely, dictate to the reporter that you except to the Court's refusal to give your request number—whatever it is. Let's get the numbers right.

Mr. Schafer: Right.

The Court: All right.

Mr. Schafer: Shall I do that now, or shall I wait until after we are finished?

The Court: No, let's get it done.

Mr. Schafer: I have Nos. 2, 3, 4, 6, 8, 11, 15, 17 through 27, 29, 35, 36, 36(a), 37, 38, 39, 40, 40(a), 41, 55, 56, and 57, and to the failure to grant in part 9, 10, and 12.

Mr. Lamb: If your Honor please, Pet would like to join in these exceptions.

The Court: All right.

Mr. Billings: I would like to state on behalf of Carnation I join in all of the exceptions Mr. Schafer has made. I didn't want to duplicate them. There is only one other one I would like to raise, which pertains particularly—

[fol. 1264] The Court: Well, let the record show, with respect to Mr. Schafer's exceptions to the Court's refusal to give his requested instructions, that sometimes counsel go further than saying just what I have suggested to you here, and they say why. Now, I don't want to be understood as limiting you in any way in the way you take your exceptions, and I don't want to be put in a position where I suggest you do it this way and the circuit says, "The judge is wrong about it, and you didn't properly take your exceptions."

I want to say this, that I have read your requests, studied them, and I understand the reasons on which I refused them, and I understand the reasons upon which you base your exceptions to my refusal to grant them, and it would not be necessary for you to acquaint me with your reasons.

Mr. Schafer: I am sure of that.

The Court: I think I understand them. I would suppose that might clean up your exception, if there is anything wrong with it.

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ADDITIONAL COURT'S INSTRUCTIONS TO JURY AND EXCEPTIONS

(Jury returns)

The Court: I said to you, ladies and gentlemen of the jury, with respect to the language of the statute, that goods of like quality—I said that it was agreed that the goods in competition were of like grade and quality. It has now been pointed out to me that the Swiss Miss pies manufactured by the Pet Milk Company are, of course, not of like grade and quality with the Bel Air pies and the Pet-Ritz pies, also manufactured by the Pet Milk Company.

Of course, all Swiss Miss pies manufactured by them are of like grade and quality, and all of the Bel Air and Pet-

Ritz are of like grade and quality. But what I now want to tell you is that the Swiss Miss are not of like grade and quality as the Bel Air and the Pet-Ritz. There is that matter which I didn't spell out for you.

Now, next, I said to you: "I instruct you that if you find that any individual defendant, any one of them, acting independently made plans to sell frozen pies in the Utah area at a loss before it knew what the prices of its competitors in that area were going to be, then the good faith meeting of competition defense is not available to that defendant."

[fol. 1265] Now, I want to spell that out a little more fully for you.

I now instruct you that if you find that any individual defendant, any one of them, acting independently made plans to sell frozen pies in the Utah area at a loss, before it knew what the prices of its competitors in that area were going to be, and a discriminatory price resulted from that plan, rather than an investigation of the market and a response to a lawful lower price of a competitor, you may find from this that the defendant was not meeting competition in good faith but was acting pursuant to a plan to sell below cost in the market. This does not mean that after investigation and in response to a lower legal price the defendant could not charge a price that results in a loss, if meeting competition was in good faith; but, in determining whether or not it was acting in good faith, you may consider whether or not the price was set after investigation and in response to a lawful competitive price or whether the discriminatory price was the product of a budget plan which projected losses for the Salt Lake trading area before defendant knew what its competitors were going to charge.

Now, furthermore, ladies and gentlemen, I think I neglected to tell you that you are not to lay any undue emphasis upon any one of the charges the Court has given you. You should examine them all and consider them in relation to one another as a whole. Moreover, sometimes

juries get the notion the judge is trying to project his views to them about something or another, and sometimes juries get back there in the jury room, and they say, "Now, I wonder what the judge meant to tell us in this respect," or, I wonder what the judge's view is about it."

Now, ladies and gentlemen of the jury, during the course of the trial the Court participates, of course, and he has something to say. I want now to instruct you that if the Court during the course of the trial at any time, or in the giving of the instructions to you, said anything that you think tended to express his view about how you should resolve the issues of fact, or the issues which I have spelled out for you in the charge, you are to lay that thought entirely out of your minds in your consideration of the case, because the Court hasn't any views on those subjects at all. It is none of my business. That is your prerogative. What I have tried to do is spell out the legal aspects of this case and its relation and application to these facts in this lawsuit.

Now, if I have said anything with respect to any of these matters at any time during the course of the trial, or during [fol. 1266] the course of the reading of the instructions, which differs from your own view of the evidence, you are to disregard what the Court says and follow your own views of the evidence.

I wouldn't tolerate letting you folks decide the issues of law, and I won't tolerate my giving to you any instructions or saying anything in the course of the trial that invades your province of deciding the issues of fact on the basis of the evidence.

Now, not only does the Court say some things during the course of trial, but the attorneys have a lot to say, all of them. And the attorneys start to say it in a complaint in the case. And all through the course of the trial the attorneys are saying things, you know.

Let me tell you again what I told you in the beginning. What the attorneys say is not evidence, what the Court says

is not evidence. The evidence is what the witnesses say on the witness stand, under oath, and subject to cross examination, plus the exhibits, if any, that have been received in this case.

Now, again, the Judge who is now talking to you, who has presided during the course of this trial, has not intended in any way, shape, manner, or form to influence you in any of the decisions which it's your prerogative to make. I have no views on those subjects, as a matter of fact. I have had enough to do with the problems that I've had to deal with without getting myself involved with your problems.

All right, ladies and gentlemen, what we are going to do —have you got a foreman? Who is your foreman?

The Foreman: We have, sir.

The Court: Very well.

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Mr. Schafer: Your Honor, could we note the exception in the record?

[fol. 1267] The Court: Yes, of course. Go ahead. Please take your exceptions.

Mr. Schafer: To the last instruction that your Honor rendered in respect to the sales at a loss in connection with the 2(b) defense, Continental respectfully excepts. I should also like to add, your Honor, numbers of three proposed instructions which were not given: Number 7, 12, 14, 28, 46, and part of 45.

Mr. Billings: May the record show that Carnation joins Continental in this exception.

Mr. Lamb: Pet joins in this exception.

The Court: All Right. The Court understands all three of you join in that exception.

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February 22, 1963
12:05 p.m.

(Jury in the box.)

The Court: Ladies and gentlemen of the jury, I am going to have you in here at two o'clock and give you a further in-

struction which will answer your question, Mr. Foreman.

In the meantime, Marshal, I want you to take this jury up to Lamb's Grill on Main Street and buy them their lunch.

Come back at two o'clock, ladies and gentlemen.

2:10 p.m.

(Jury not in the courtroom.)

The Court: First of all, let's— When you are through with the note from the jury, we will leave it with the clerk to be entered in the file.

Mr. Schafer: Shall we hand these up?

The Court: No, I don't want them handed up. I want to talk with you about it.

Mr. Alioto: I would like to talk about it.

[fol. 1268] The Court: All right.

Mr. Alioto: I think I know what is bothering this jury. I think that some of them have gained the impression that undercutting is a necessary element of the price difference. I know where they gained that impression. They gained that impression from your Honor's charge that the good faith meeting of competition defense is not available to a seller who goes beyond the meeting and then undercuts.

So from that I can see where somebody, listening to it for the first time, might have gained the impression that a price difference is not enough, that the lower leg of the price must somehow undercut the competitive prices.

The Court: Yes.

Mr. Alioto: Now, there is nothing better settled than that that isn't true, and I assume that counsel's instruction recognizes that, though I haven't seen it.

Mr. Schafer: I agree with that entirely, your Honor.

Mr. Alioto: In the Federal Trade Commission-Anheuser Busch case you actually had a situation where Anheuser Busch did nothing more with Budweiser than to meet the price of the competitor.

One of the charges was that because it was a premium beer—one of the allegations—because it was a premium

beer, that the price should have been higher, that even meeting was undercutting, but it wasn't necessary.

So it seems to me that the court ought first to disabuse the minds of the jury on this question that undercutting is not an element of the price difference, that there can be an illegal price difference even though there isn't any undercutting. And again I say the confusion arose, no doubt—

The Court: There isn't any undercutting in the Salt Lake market in this case.

Mr. Alioto: Well, there is. We believe that the Morton price is an undercut price, the 2.85 price.

[fol. 1269] The Court: What you are saying is that there isn't any undercutting on the low leg.

Mr. Alioto: It doesn't have to be.

The Court: That's right.

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Mr. Schafer: As we understand the jury's inquiry, your Honor, it doesn't call for any of the lengthy discussion of impact and injury, and what-have-you, that Mr. Alioto has just been suggesting to you. It seems to us that what the jury's concern is is not 2(a), but 2(b), and what the jury wants to know is, is 2(b) a complete defense to a price difference in Los Angeles and Salt Lake City?

The jury says: "Assuming no undercutting, is the $3 price unlawful?" And it seems to us clear that what the jury wants to know is: Is meeting competition a complete defense to the statute, the 2(a) statute?

The jury has assumed in its question, if your Honor please, no undercutting. It has assumed that. So I don't see any need for all this lengthy discussion of undercutting that Mr. Alioto has just been suggesting.

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I don't see any reason, your Honor, to go through this long, lengthy discussion about impact and damages.

I do think, your Honor, the jury needs a little more help on this issue of substantial lessening of competition, a little

more development of what we are talking about there, and talking about the general level of competitive activity. I don't think they quite fully appreciate that, your Honor. And, as your Honor is aware, we did make some proposed instructions there, which, if your Honor was disposed to amplify the question, we could resubmit.

Mr. Alioto: If your Honor please, I don't think the jury is bothered about whether or not, as counsel states as a premise for everything he has said, as to whether or not the meeting of competition in good faith is a complete defense. There is nothing in this question which portrays any lack of understanding of the jury on that issue at all.

[fol. 1270] The Court: I agree with you. They don't say anything about that at all.

. . . . . .

Mr. Alioto: In my proposals, if your Honor please, I have said quite explicitly, and I think in a balanced fashion, because I am not interested in any emphasized instructions at this point of the game, I assure you, Mr. Schafer—I have said, I think, as clearly as Mr. Schafer could say it:

"You will recall that I earlier instructed you that it would be a complete defense if the lower price at Salt Lake was charged in order to meet the equally low price of a competitor in good faith."

Mr. Schafer: Well, we don't develop, Mr. Alioto what "good faith" means.

The Court: Well, now, I am not going to tolerate any argument about it.

Mr. Schafer: All right.

The Court: You needn't pursue it any further, Mr. Alioto.

. . . . . .

Mr. Alioto: I think, as I have indicated again, all of the elements mentioned by Mr. Lamb—or Mr. Thatcher—are included in my proposed instruction, except one, which, as

far as I am concerned, embodies an obvious misconception of the law.

There is no element of 2(a) which requires proof of a specific predatory intent. It is enough that a price difference have a reasonable probability to lessen competition or tend to create a monopoly.

So any of this conversation about a specific predatory intent simply isn't the law.

Except for that, I think that the instruction I have proposed, in addition to stating quite specifically that meeting competition is a complete defense, goes on further to say—And here is the way I put it, so your Honor will know it is in there—

[fol. 1271] The Court: Well, you don't need to—

Mr. Alioto: In other words, the price difference is just the first step; then they have to find all of the other elements of the offense and also find that none of the defenses mentioned by you has been proved.

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Mr. Handley: I wonder, your Honor, if I might just add a word or two. Upon reading the problem that the jury presented you with, I had roughly the same interpretation that Mr. Schafer did, that is, that there were some members of the jury who we felt that a price difference was per se illegal and other members of the jury felt that there was something to this good faith meeting of competition defense.

The proposed instruction which I drafted is roughly the same as Mr. Schafer's, that is, the substance is the same. And we would join with Mr. Schafer in his instruction. And we would join with Mr. Schafer in his argument that he has made.

There is one point that I have which is peculiar to Carnation, your Honor, and that is that the proposed instruction of Mr. Alioto, while attempting to cover a lot of ground, I believe leaves the impression that a price discrimination which undercuts the prices of the plaintiff in Salt Lake City, the Salt Lake City market, is itself illegal; that is, it does

not spell out these other elements of the offense. The injury to competition is what I am speaking of.

The Court: I thought he spelled it out very clearly.

Mr. Handley: I believe he mentioned there were other elements to which you referred before.

The Court: No. He talks particularly about the meeting of competition.

Mr. Handley: If it does, your Honor—

Mr. Alioto: First of all, we said that—

[fol. 1272] "You will recall that I earlier instructed you that it would be a complete defense if the lower price in Salt Lake was charged in order to meet the equally low price of a competitor in good faith."

And then on your other matter as to whether we specifically mentioned that the price difference alone doesn't mean anything, we first start out by saying that the price difference—

"Of course, the price difference is the first step in your inquiry and then you must consider all of the elements of the offense as I have explained them to you, and all of the possible defenses, as I have explained them to you."

And then we specifically mention the defense of good faith. And over here we specifically say: "I have instructed you— "

"On the question of whether a price difference, which does not undercut the competition, can have the reasonable probability of lessening competition or tending to create a monopoly, I first point out to you that the statute does not require an actual lessening of competition . . . "

First we say that, in addition to the different price, you have to prove that there was a lessening—a reasonable probability of lessening competition and a tendency to create a monopoly. We say that very specifically, as well as defense.

And then we go on to say that the "reasonable probability of lessening competition or tending to create a monopoly, I

first point out to you that the statute does not require an actual lessening of competition or the actual monopolization of the market. It simply requires that the price discrimination, as I have explained that phrase to you, may have the reasonable probability of lessening competition or tend to create a monopoly."

Mr. Handley: This paragraph that begins with: "On the question of whether a price difference, which does not undercut the competition, can have the reasonable probability—"

Mr. Alioto: Yes.

Mr. Handley: I am concerned about the inference that a price difference which does undercut the competition will necessarily have that probability.

[fol. 1273] Mr. Alioto: That is in here. Just a minute. It is in here specifically: The fact that a lower price in the area— That is on our side of it, and then the balance of it is: ". . . nor does it mean that it must have had such an impact. In this connection you are the sole judges of the fact."

If your Honor please, we have covered all of the elements that are mentioned in these instructions which are in accord with the law. We certainly have not covered this question that you have to have a predatory intent. There is no such law.

The Court: All right, each of you file whatever requested additional instructions you have. And I assume you have done that now. You have all talked to me about it.

I am going to grant Mr. Alioto's request and deny all the others, and I am going to have the court reporter type this up.

This is done in longhand, and your handwriting is better than mine, but if we get it typed up and then just put our eye on it to be sure I have it straight, I will deliver it to the jury. In the meantime, bring that jury in. I want to tell them what we are doing. They will wonder why they don't get an answer to this question.

Mr. Schafer: Your Honor, in connection with the instruction I submitted and read into the record earlier, I made a brief amendment, and I wonder if I could read it into the record now at this time for your Honor's consideration.

The Court: I don't think your exception would be worth anything if you didn't tell me what the instruction was.

Mr. Schafer: I agree with that.

In speaking, your Honor, of my request that your Honor charge with some particularity what the meaning of the good faith meeting of competition defense is, I have a paragraph I would like to read again as I have amended it.

The Court: Go ahead.

Mr. Schafer: This would be the fourth paragraph of my earlier proposed instruction.

[fol. 1274] "In connection with this issue—" That is the good faith issue. "—it is only necessary that you find that a seller did reasonably think that the $3 price was necessary to meet competition in Salt Lake City, having regard for all the market factors of which there has been evidence in this case, and that such $3 price was in fact only 'equally low.' It is not necessary that you yourselves agree with the seller's judgment as to what price was necessary, but only that you find the seller acted in good faith. If you do so find, you are instructed that the lower prices in Salt Lake City are lawful."

And then I have made a slight amendment *in the* on the first paragraph of page 2 of the proposed instruction, which paragraph was captioned small "a."

The full paragraph would now read:

"That the difference between the $4 price and the $3 price was reasonably likely to lessen substantially the competition among pie producers generally in the Salt Lake market; i.e., was there less competition among sellers in Salt Lake City as a result of the difference between the two prices or may there be less competition in the future; and also unless you find"

And then the paragraph goes on into subparagraph "b." Those two points, your Honor, are intended to amplify what I believe is required here, a fuller statement of the meaning of "good faith," and a fuller statement of what we mean by "substantial lessening of competition." I don't feel the jury really understands those legal concepts so far.

The Court: Very well.

Mr. Aliotb: Our point, if your Honor please, was that the jury question doesn't call for any of these things at all.

The Court: Of course it doesn't.

* * * * * * *

(Jury returns)

The Court: All right, ladies and gentlemen, you have submitted to the Court the following question and requested me to instruct you further on the point of law involved. Your question is:

[fol. 1275] "A point of dissension has arisen. Namely, is it unlawful for a pie producer to sell its pies near its plant and sell the same pies in another area at a lower price? In other words, is it unlawful for a company to sell, for example, pies in the Los Angeles market at $4 per dozen and at the same time sell pies in the Salt Lake area at $3 per dozen, the Salt Lake price not undercutting the competitor's prices in that area?"

Now, I gather, ladies and gentlemen, from your question that some of you have gained the impression that undercutting is a necessary element of this offense. This is not correct. Undercutting, or charging a price below the competitor's price, is not an element of the offense at all.

I did mention undercutting in my instructions, but that was with reference to my instructions on good-faith meeting of competition, where I told you that even this defense was not available to defendants if they went beyond meeting competition and actually undercut the price. This is the only sense in which undercutting was mentioned in my charge. It is not necessary that the price difference involve a lower price which undercuts the competitor's price. It is

enough that a different price is charged for goods of like grade and quality. Of course, the price difference is the first step in your inquiry and then you must consider all of the elements of the offense as I have explained them to you, and all of the possible defenses, as I have explained them to you.

The answer to your specific question is that it could be unlawful to have a $4 price in Los Angeles and a $3 price in Salt Lake City even though the Salt Lake City price does not undercut "the competitor's prices in that area."

However, since I do not want you to consider any one instruction in isolation—you remember I told you to consider the charge as a whole—I shall talk further with you upon the other features of the law.

You will recall that I earlier instructed you that it would be a complete defense if the lower price in Salt Lake City was charged in order to meet the equally low price of a competitor in good faith. But this good faith meeting of competition defense is not available if the price used in Salt Lake actually undercut the competitor's price.

However, this does not mean that there must be an undercutting of the price for a violation of Section 2(a) of the [fol. 1276] Clayton Act. It is enough that there is a difference in price between one area and another even though the lower price does not undercut the competitor's price, provided all of the other elements of the offense are present and provided further that none of the defenses available to the defendants has been proved. It is not an automatic violation of the law if the lower price in a price difference is under the competitor's price. You must consider all of the other elements and other defenses.

There are three elements in the plaintiff's case here. He must prove by a preponderance of the evidence:

(1) A violation of the antitrust statutes,

(2) An impact upon the plaintiff from that violation, and

(3) Economic facts from which damages for the injury may be approximated.

If there is a price difference, ladies and gentlemen, between the Los Angeles market and the Salt Lake market, and the lower price is in Salt Lake and the higher price is in California near the plant, and there is a reasonable probability that this will lessen competition or tend to create a monopoly, and all of the other elements I have instructed you upon do not justify that price difference, then I instruct you that the price difference does constitute a violation of 2(a) of the Clayton Act even though the lower of the two prices does not undercut the competitive prices in the area of the lower price.

When you come to consider the question of injurious impact, you may take into consideration that at some period of time the lower price in the Salt Lake area did not undercut the competitive price, and, weighing this with all of the other evidence in the case, you may consider to what extent, if any, the evidence shows an injurious impact upon the plaintiff, either by way of putting pressure on plaintiff's prices or depriving him of sales which he might have made in the absence of the price difference.

The fact that a lower price in the area was not under the plaintiff's price does not mean that the lower and different price could not have an injurious impact upon plaintiff nor does it mean that it must have had such an impact. Whether it has such impact or not is a question of fact for you to determine, ladies and gentlemen of the jury. In this connection you are the sole judges of the fact.

[fol. 1277] On the question of whether a price difference, which does not undercut the competition, can have the reasonable probability of lessening competition or tending to create a monopoly, I first point out to you that the statute does not require an actual lessening of competition or the actual monopolization of the market. It simply requires that the price discrimination, as I have explained that phrase to you, may have the reasonable probability of lessening competition or to tend to create a monopoly.

Therefore, ladies and gentlemen, it could be unlawful to sell pies in the Los Angeles area for $4 and for $3 in the

Salt Lake area, even though the Salt Lake price does not undercut the competitor's prices in that area. I mean to say by this that the fact that the Salt Lake price does not undercut the competitor's prices here is not a defense if all of the other elements of the violation are present and you find that the price difference between Los Angeles and Salt Lake might have the reasonable probability of depriving plaintiff of sales or of forcing his prices down; or if there is the reasonable probability that the practice of maintaining a one-dollar differential between the place where the plant is located and Salt Lake City might tend, if long continued, to create a monopoly in the Salt Lake area.

One further observation needs to be made. I have been speaking of unlawfulness under 2(a) of the Clayton Act. If the lower price in Salt Lake was the result of a tacit understanding among the defendants that they would all compete more vigorously against the plaintiff in Salt Lake City than against themselves in California, for example, then that lower price would be illegal per se as a price fixed pursuant to a price-fixing combination or conspiracy as I have explained that to you. If you find a conspiracy, or a tacit understanding, to fix lower prices in Salt Lake City than elsewhere, it matters not, ladies and gentlemen of the jury, that the prices fixed are reasonable or low, in response to changing conditions or in response to meeting competition. They would be illegal if part of a conspiracy or a tacit understanding. A price fixed, in connection with such a combination or conspiracy does not have to be a specific price. It may be a price range or a price formula. It may also be an agreement to charge generally lower prices in the plaintiff's competitive area than are charged where the plaintiff is not competing. All such price-fixing agreements or tacit understandings are illegal per se, that is, they are illegal in and of themselves, and nothing can justify them.

[fol. 1278] I caution you that you are to consider all of my instructions as a whole, those I have given you heretofore and the one I am now giving you. You are to look at all the

evidence, not just segments of it, consider it as a whole, in coming to your final decision.

All right, ladies and gentlemen, the marshal will take you back to the jury room.

(Jury retires)

The Court: All right, you may proceed.

Mr. Schafer: I would like to note for the record, your Honor, my exceptions to the instruction that has just been given, specifically those exceptions are that, as I have already said to your Honor, I conceive the jury's question to be one of an expression of interest in the good faith meeting of competition defense, which is at the heart of Continental's defense to this action, and I don't feel that the instruction just given is generally responsive to the question posed by the jury.

Specifically, I would except, your Honor, to the failure to define fully the meaning of "good faith." I have already said that before, and I won't amplify that.

I also would except to the failure to define more fully the meaning of what we are talking about in terms of substantial lessening of competition.

In respect to page 2 of the instruction as was given, I except to the use of the phrase, "If the price used in Salt Lake actually undercut." I conceive, your Honor, that jurisdictionally what we have to limit ourselves to is the prices actually charged in the Salt Lake market under the Robinson-Patman Act.

On page 3, your Honor spoke of the requirement of reasonable probability of the substantial lessening or tending to create a monopoly, and my exception there relates to the fact that there was no definition of what market the jury was to look to in determining whether or not there had been any of those adverse competitive effects.

On page 3 again the jury was instructed in the words, "when you come to consider the question of injurious im-
[fol. 1279] pact," and my exception there, your Honor, is

that that language, it seems to me, assumes that the jury will reach the question of injurious impact, i.e., that the jury will find that there was a violation of the Patman Act.

Again in that paragraph on page 3—and it occurs again on, I think, page 4—there was language that the jury could find injurious impact by reason of "putting pressure on plaintiff's prices or depriving him of sales." And, your Honor, I would respectfully except to the language that relates to putting pressure on plaintiff's prices. Again, as I conceive the Patman Act, jurisdictionally what is involved simply is actual sales made that deprived plaintiff of sales, and that the question of general pressure on plaintiff's prices is not within the ambit of the Patman Act.

The language on page 4 of the instruction was "of depriving plaintiff of sales or of forcing his prices down." And my exception would be the same in respect to the language reading, "of forcing his prices down."

Again, in that first full paragraph on page 4, your Honor, I would respectfully except to the language which reads "or if there is a reasonable probability that the practice of maintaining a one-dollar differential between the place where the plant is located and Salt Lake City," etc. My exception there is that the language assumes, your Honor, that the jury said there was a practice shown by the record of maintaining a one-dollar differential; and my exception, of course, is that there is no such evidence in the record.

And my exception generally, your Honor, if I may respectfully except to the language relating to the conspiracy matter, I don't conceive that any of that language was at all called for by the jury's inquiry, and it does seem to me that the defendants are prejudiced by a renewed emphasis on the conspiracy part of the allegations where the jury, as I conceive its inquiry, did not ask for any discussion of that element of the plaintiff's case.

And on page 5, your Honor, I would except respectfully to the language—the full sentence reads: "They would be illegal if part of a conspiracy or tacit understanding."

And my exception there, your Honor, relates to the language "or tacit understanding," and it seems to imply [fol. 1280] to the jury that there may be a difference between a conspiracy and a tacit understanding and they would find a violation even if they had not found a conspiracy.

The Court: A conspiracy is an understanding between the defendants. That is all that is necessary.

Mr. Schafer: I believe, your Honor, I have made the necessary record on the refusal to grant my own proposed instruction. Do I have to renew that exception now?

The Court: I already passed on it. I don't think you need to read it all over to me. You read it once, didn't you?

Mr. Schafer: I am sure I did. Mr. Kesler suggested to me that maybe I have to make a record on that. I don't think I do.

The Court: Well, I have refused, and I will refuse now, to give your requested instruction.

Mr. Schafer: I was sure you would, your Honor. I just wondered if it was necessary to note an exception to the failure to give that instruction.

The Court: Yes, you ought to note an exception, and you have done it, I take it.

Mr. Schafer: I think I have, yes.

The Court: Go ahead, Mr. Thatcher.

Mr. Thatcher: In the first place, it occurs to me, your Honor, that perhaps for the record, again I am not sure, we should join in a stipulation that these exceptions may be taken and may be deemed taken within the presence of the jury, and any failure to have the jury present—

The Court: I understood that stipulation to cover any instruction that the court might give to the jury.

Mr. Thatcher: Fine. I wasn't sure.

The Court: If you have any different understanding about it, you may now tell me. If you don't, I will assume that you all agree.

Mr. Thatcher: I do, your Honor.

[fol. 1281] Mr. Schafer: Continental does, your Honor.

The Court: You don't need to stipulate all over again.

Mr. Thatcher: Pet Milk Company very respectfully joins in the exceptions taken by the defendant Continental Baking Company and respectfully also makes the following exceptions to the instructions given by the court in answer to the question for the reasons to be specified:

(1) On page 1 of the background statement, the mentioning of undercutting is not responsive to the question, and it amounts to a prejudicial reiteration of points in language favorable to the contentions of the plaintiff without any balancing statement of the contrary.

(2) In the whole of the matter, if the Court please, we except to a repetition six, seven, or eight times where it is stated that "this could be under said facts stated," without ever stating the counterpart that under other facts and circumstances this could not be, and amounts to undue emphasis upon the affirmative as contended by the plaintiff and is highly prejudicial.

Then, if the Court please, defendant Pet Milk further excepts to the language of the instruction in that, while it repeats and re-emphasizes the elements which would make the price with respect to which the question was made illegal, it incorporates merely by reference at this late date, and after the jury has been deliberating for some time, the various factors which would make the charging of this price perfectly legal or defensible with the one exception, of course, of the affirmative defense, and it does not define the other elements of the defense necessary under Section 2(a), and also results, in effect, in voluntary additional instructions not responsive to the question and a reiteration of instructions of plaintiff, after the jury has been deliberating.

The defendant Pet Milk Company, referring now to page 4 and the particular statement that "if there is the reasonable probability that the practice of maintaining a one-

dollar differential between the place where the plant is located and Salt Lake City might tend, if long continued, to create a monopoly in the Salt Lake area," Pet Milk objects to the use of the word "practice" for the further reason that there is no evidence in the record to justify such an instruction and assumes a matter of practice for which there is no evidence to support, the evidence clearly showing that there is, if the Court please, only sporadic and temporary price differentials, rather than a practice.

[fol. 1282] Finally, with respect to the conspiracy, it is objected to as being volunteer, not responsive to the question, and repetitious and giving undue emphasis where the question has not to do with conspiracy, and conspiracy should not be reconstructed after the jury has been fully instructed and has started upon its deliberations.

Finally, if the Court please, defendant Pet Milk Company excepts to the failure of the court to give Pet Milk Company's requested instruction as contained on the first two pages and separately as to the one on page 3 of Pet's requested instruction in the alternative, in that if good faith competition or predatory intent was implied in the jury's question, or if the impact or damage was implied, then a shorter and more direct instruction was proper, rather than a repetitive and affirmative statement on the matter.

Thank you, your Honor.

The Court: All right.

Mr. Handley: Carnation Company takes exception—joins in the exception of Mr. Schafer to the failure of the court to accept the proposed instruction Mr. Schafer gave.

Secondly, we except to the acceptance of the plaintiff's proposed instruction on grounds already stated by counsel for Continental Baking Company and Pet Milk Company, and we add one other ground; specifically, that the instruction as given leaves an implication that there are no elements of the offense to be proved provided it can be shown that the price differential undercuts the plaintiff's price in

the Salt Lake City market. Specifically, I have reference to two passages on page 2.

The instruction says:

"The answer to your specific question is that it could be unlawful to have a $4 price in Los Angeles and a $3 price in Salt Lake City even though the Salt Lake City price does not undercut 'the competitor's prices in that area.'"

This instruction covers a good deal of ground, and I believe that the omission of a specific enumeration of the elements of the offense in this instruction leaves the implication that there are no additional elements to the offense to be proved.

Thank you.

[fol. 1283] Mr. Schafer: Continental joins in the exceptions stated by Pet Milk Company and Carnation Company.

The Court: All right. Now, is there anything further.

Mr. Handley: May I also join in the exception of Pet Milk Company?

The Court: Yes. Anything further?

All right, we will be in recess.

(Recess had.)

(Jury returns at 5:10 p.m.)

The Court: Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have.

The Court: Hand it to the officer.

Read the verdicts to the jury.

VERDICTS

The Clerk: "We, the jury, duly impaneled in the above-entitled case, find as follows:

"Defendant Continental Baking Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere,

in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $24,994."

"We the jury, duly impaneled in the above-entitled case, find as follows:

"Defendent Pet Milk Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere, in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $44,197."

[fol. 1284] "We, the jury, duly impaneled in the above-entitled case, find as follows:

"Defendant Carnation Company has individually and independently discriminated in the prices which it has charged for frozen pies in the Utah trading area and the prices which it has charged for frozen pies elsewhere, in violation of Section 2 of the Clayton Act, and thereby proximately caused plaintiff damage in the amount of $29,277."

"We, the jury, duly impaneled in the above-entitled case, find as follows:

"The following defendants have conspired to fix the prices at which they would sell frozen pies in the Utah trading area and thereby caused plaintiff damage:

"Damages proximately caused by the conspiracy." None.

"We, the jury, duly impaneled in the above-entitled case, find as follows:

"Plaintiff Utah Pie Company has discriminated in the prices which it has charged to competing customers for frozen pies in the Utah-Idaho trading area in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and thereby proximately caused Continental Baking Company damage, for which Continental is awarded one dollar."

Mr. Foreman, is this your verdict?

The Foreman: It is.

The Clerk: Ladies and gentlemen of the jury, each and every one of you, is this your verdict?

The Jury: It is.

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COLLOQUY RE ATTORNEYS' FEES, JUDGMENTS, ETC.

Mr. Alioto: If your Honor please, I would like at this time to move that the court, in accordance with the law, automatically treble the amounts returned by the jury. As your Honor knows, the provisions of the statute call for treble the amount of damages found in the verdict of the [fol. 1285] jury, and this, of course, is not a discretionary matter. It is made mandatory by the statute and by the opinions of the court. We therefore move on behalf of the plaintiff that the verdict of the jury be treble in the judgment of the court and that the plaintiff be awarded a reasonable attorney's fee to be set hereafter in accordance with the statute and that the plaintiff be awarded his costs of litigation, to be filed in a cost bill with the court.

The Court: The motions are granted.

Mr. Schafer: Continental moves, your Honor, that it be awarded reasonable attorneys' fees in respect to its successful counterclaim and for costs in that connection as well.

The Court: Granted.

Mr. Alioto: Does the court have any disposition about when it would like to hear these other matters and the injunction matter? There is still left over the question of an injunction.

The Court: I will hear them in the morning if you want, while you are here. Am I rushing you too much?

Mr. Alioto: And also the matter of the attorneys' fees as well, which I think, in view of the decision of the Court of Appeals of the Tenth Circuit in the Carbide action, it would become largely automatic, not entirely automatic,

but the court has indicated a rather strong view of the percentage that should be applied. But in any event we will take that up with the court tomorrow morning, and I think we can make the factual record that is necessary.

The Court: Yes, I would like to look at that Tenth Circuit decision about that.

Mr. Schafer: We are going to have a hearing tomorrow morning on those matters, your Honor?

Mr. Alioto: The injunction matters. And we will be prepared to present a very simple form of decree, because I think Anheuser Busch case has pretty well set it out for us. And I think, of course, we would have to accept the same form of decree on Morton's counterclaim.

The Court: Well, we will talk about that tomorrow. I have some discretion abo t this matter of the counterclaim, don't I? At any rate, I will hear you tomorrow morning.

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[fol. 1286] February 23, 1963

The Court: All right, gentlemen.

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Mr. Alioto: If your Honor please, I would like first to address myself to the matter of the judgment. I have handed your Honor a proposed form of judgment. I have given copies to counsel. Counsel have copies of it. It needs the filling in of the attorneys' fees and the costs. In accordance with your Honor's direction of yesterday, we have filed an affidavit in connection with our attorneys' fees, in which we indicate we have spent approximately 3100 hours.

The Court of Appeals in the Carbide case indicated approximately 15 per cent of the treble judgment was reasonable under the circumstances of that case. Now, actually, 15 per cent of the treble judgment here results in a situation of approximately fifteen dollars an hour, which is more than reasonable and, while the 15 per cent was not an ironclad rule, as evidenced by the fact that the attorneys' fees in the Cinema Amusement case in the Tenth Circuit were more, we are content to predicate our motion on approxi-

mately 15 per cent, and we therefore make a motion for judgment for attorneys' fees for fifty thousand dollars in accordance with Section 4 of the Clayton Act. We would suggest that they be apportioned as follows:

On the second page of the proposed judgment we are requesting an apportionment of $14,000 to the Continental Baking Company, $20,000 to the Pet Milk Company, and $16,000 to the Carnation Company, a total of $50,000.

[fol. 1287] The Court: Let me write that in.

Mr. Alioto: These are in accordance with the approximate amounts of the judgment. On the first blank, on paragraph No. 1—

The Court: Continental.

Mr. Alioto: Continental, we are proposing $14,000 of the fifty. In paragraph 2 we are proposing $20,000 as an allocation against the Pet Milk Company. And in paragraph 3 we are proposing $16,000 as against the Carnation Company. That is a total of $50,000, with the apportionment made in accordance with the size of the judgment against each.

I simply point out in that connection that we have on file this affidavit that approximately 3100 hours were spent by me and my associates, Mr. Bertain, Mr. Mitchell, and Mr. Hughes.

The Court: I have read that.

Mr. Alioto: And we think in the light of the Carbide decision that it is reasonable and, as a matter of fact, it is considerably lower than most cases of like amount.

I point out, for example, that the Goldwyn case, which was a judgment for $30,000 had attorneys' fees of $100,000, and there were others. But we think $50,000 is reasonable under all the circumstances of the case, and we would respectfully submit that the court enter that amount.

The Court: I think it is eminently reasonable, and the court will award those attorneys' fees.

Now, what else is there?

Mr. Alioto: If your Honor please, we have set up the form of judgment so that it be self-contained.

Mr. Schafer: Excuse me, Mr. Alioto. Your Honor, could I just note for the record my opposition to that award.

The Court: Of fifty thousand dollars?

Mr. Schafer: Yes, your Honor.

[fol. 1288] The Court: If I had been doing it without this motion, it would have been higher than that, I will say for the record.

There is a difference between the Carbide case and this one in the amount of the judgment. They had about a three-million-dollar judgment. Fifteen per cent of three million seems like a whole lot different attorney's fee than fifteen per cent of three hundred thousand. But counsel is satisfied with the 15 per cent, so I awarded him fifteen per cent.

Mr. Schafer: I won't state my reasons, your Honor, for opposition, if you don't want me to.

The Court: Yes, all right. It is really a remarkably reasonable fee in this court's opinion.

* * * * * * * *

Mr. Schafer: * * *

In the first place, your Honor, I want to say that in my view the plaintiff is not entitled, under principles of equity, to any injunction at all. The plaintiff does not come into this court with what is called "clean hands."

The jury has found that the plaintiff itself has violated the same section of the statute that Continental has been found to have violated. I think in that posture, your Honor, it is perfectly clear that the plaintiff is not entitled to this court's injunctive or equity relief. And the case in point on that, if your Honor please—

The Court: You don't need to cite any cases on that point.

Mr. Schafer: I just wanted to say—

The Court: What disturbs me about the verdict for nominal damages is that I don't understand the violation that they found. How could they find a violation by the plaintiff

on the evidence in this record? I don't understand that. I would like to hear somebody address themselves to that subject this morning.

Mr. Schafer: Your Honor, in view of Mr. Alioto's motion, I thought that we would address ourselves to that question next, if you will, or at some later time.

[fol. 1289] The Court: You are talking about "clean hands," and I am talking about setting aside that verdict.

Mr. Schafer: Your Honor, let me say this, if I may—

The Court: They seem to me to be tied up together.

Mr. Schafer: Then let me address myself to that, your Honor, if I may.

The record is replete with instances where the plaintiff has charged different prices to competing customers in the Salt Lake City marketing area, different prices, substantially different prices; some prices are considerably lower than other prices. In other words, we had proof of prices of three dollars on apple pie to some customers and $3.70 on apple pie to other customers.

Now, in a situation as highly competitive as this industry is that difference in prices, as substantial as that is, clearly it is going to have the adverse competitive effects that the Patman Act proscribes.

The Court: Do you think that had any impact on your people? I think that had about as much impact as a flea bite.

Mr. Schafer: I think it certainly did, your Honor. It reduced this market from a three-dollar—

The Court: On this record I don't see it.

Mr. Schafer: Well, I think, your Honor, if I may that the jury found that it did have, that the jury found that that price lowered the general competitive level from $3.70 to $3.00, and at that $3.00 price for at least a year Morton couldn't get into this market and sell, and that when it did get into this market in June of 1961 and sell, it had to sell at a substantially lower price than the jury could have found it could have sold if there hadn't been that $3.10 price on the private label pie of the plaintiff in the market, which

pervaded the market, which lowered the market price from $3.70 to $3.10.

I think there is clearly enough evidence for the jury to have found impact, and I think the jury found impact and found substantial damages. Continental, however, waived its claims for damages, but that doesn't vitiate the cause of action.

[fol. 1290] The Court: I don't know on what basis you say the jury found substantial damages.

Mr. Schafer: It was told that it had to find damages before it could make a judgment against the plaintiff on a counterclaim, so presumably it made that finding, your Honor.

The Court: I don't think so. No "presumably" about that at all. Are you a mind reader, reading the mind of the jury?

Mr. Schafer: All I can say, your Honor, is that the jury was told that it had to find violation, that it had to find impact on Continental, and that it had to find damages to Continental; and it came back with a judgment against plaintiff on Continental's counterclaim. So I must assume, and I think the court has to assume, your Honor, that the jury then did find that there was that violation having that impact. I think that is a jury verdict on evidence clearly supported by the evidence. And I will submit that the judgment should not be set aside by the court.

Now, if it is true that it should not be set aside, clearly there is an "unclean hands" doctrine available to Continental in respect to this request for an injunction by the court.

I should also add, your Honor, in respect to this counterclaim, that the plaintiff has never made any motion for a directed verdict on that counterclaim.

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The Court: I think all the proposed decree proposes is that you abide by the law. You are already obliged to abide by the law.

All right, Mr. Alioto.

Mr. Alioto: I would like to address myself to some of the things that have been said, because I think they show a misconception of the decree and secondly of the law regarding the right of a private person to have injunctive relief.

As your Honor knows, the law specifically provides in U.S.C. 26 that a private person shall have a right to address the court for relief, as well as for damages, and there is no real distinction between the wording of that statute and the wording which gives the Government the right to secure decrees on the basis of equitable proceedings.

. . . . . .

[fol. 1291] In contradistinction to that, all we are saying here is that you may not lower your price or charge a lower price in the states of Utah, Colorado, Montana, Washington, and Idaho, unless you bring your price down in California as well.

I think Mr. Thatcher misconceives this injunction when he says he is going to prevent competition down in California. Nothing prevents them from charging a lower price in California where the plant is. If they want to, they can give their goods away in California, and it wouldn't be affected by this decree at all.

All this decree says is that you may not charge a lower price in Salt Lake City, 750 miles away from your plant, than you are charging right at the site of your plant. That is all it says. It doesn't say anything more than that.

. . . . . .

Now, on the matter of "unclean hands," if your Honor please, we have a motion of the court to enter a judgment in favor of the plaintiff on that matter. We, of course, didn't have to make a motion for a directed verdict in order to make this motion for a judgment notwithstanding the verdict, and our reasons for not wanting to have taken that issue away from the court were reasons, frankly, of great caution in connection with a possible appeal, so it couldn't

be said that because that fact wasn't before the jury for their determination, that these folks were somehow prejudiced. We were perfectly content to let the jury see the while picture and make their decision on the basis of the whole picture and make their decision on the basis of the to have filed our motion for a directed verdict, and I think that under the facts that motion should have been granted.

Now, what are the facts? There is not one bit of evidence by Continental Company that there was any injurious impact upon it. The facts of the matter showed that the Continental Company increased its share of the market by some two thousand per cent beginning in 1958, which is the measure the jury apparently took, and winding up in 1961 there was a tremendous increase in the market so far as Continental is concerned. And the price discrimination he spent most time on was an alleged ten-cent price discrimination in Spokane, Washington in connection with a private label, the Sonny Boy label, which wasn't owned by the plaintiff, but owned by the retailer involved, and that price dis-[fol. 1292] crimination lasted for approximately a month, under the evidence in this case. And there is not the slightest evidence, nor can there be any evidence, that there was any kind of injurious impact upon the Continental Baking Company at all. And when one considers the size of the Continental Baking Company, it is almost ludicrous to suggest that there could have been in the Spokane market by virtue of that one month's sale of the Sonny Boy label at a 10-cent differential, a differential predicated upon a freight absorption at that—that that could possibly have had an injurious impact upon Continental.

Quite aside from any injurious impact, it seems highly improbable—and there is absolutely no evidence at all—that that resulted in a substantial lessening of Continental's competition in the Spokane market, because the invoices that we have in evidence in connection with that Spokane and Seattle market showed that Continental was quite active in that market. We find, I respectfully submit, no evi-

dence at all of injurious impact or substantial lessening of competition so far as Carnation is concerned.

The Court: So far as Continental is concerned.

Mr. Alioto: Continental, excuse me, if your Honor please, Continental is concerned.

* * * * * * *

The Court: All this decree proposes is just that you carry on your business in a lawful manner.

Mr. Schafer: Your Honor, the point is we would have to come in and defend—

The Court: And you are obliged to do that anyway.

Mr. Schafer: That's right.

The Court: And you haven't been doing it.

Mr. Schafer: Well, I submit, your Honor, that we have been doing that.

The Court: The jury found to the contrary.

Mr. Schafer: I am making a motion today to reverse that finding.

The Court: You what?

[fol. 1293] Mr. Schafer: I am going to make a motion, of course, to renew my motion for a directed verdict and for a judgment n.o.v.

The Court: All right.

Mr. Schafer: Now, your Honor, supposing Morton can get three dollars and a half for its pies in California, supposing Morton gets up to that point, that would preclude Morton from selling in the Utah market at a price that is now established by the plaintiff at about $2.90 for apple pie.

What reason is there for precluding Morton or Carnation or Pet from coming into Utah if they can get a better price in California?

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The Court: All this says is that you must not sell lower in the plaintiff's market up here than you sell down in California. You can sell for whatever you want down in California, but you may not sell lower up here.

* * * * * * *

The Court: Then there are motions pending made by the defendants both at the close of the plaintiff's case and at the close of all the evidence, and those motions are now denied, all of them.

Mr. Schafer: Your Honor, I was going to renew my motion for a directed verdict and for a judgment n.o.v. I would suppose, am I not correct, in view of the ruling your Honor just made, there would be no point in my restating the grounds for those motions?

The Court: All through this trial, Mr. Schafer, you have been asking me to give you some legal advice, and the court doesn't want to enter into that. I don't want to suggest to you how to take your exceptions and how to make your motions. You just proceed.

Mr. Schafer: I am just trying not to tax the court's patience with redundancy, your Honor.

The Court: The court is very patient this morning.

[fol. 1294] Mr. Schafer: All right.

The Court: His patience is in good shape. You go right ahead.

Mr. Schafer: In respect, your Honor, to our motions for directed verdict and for a judgment n.o.v. and for a new trial, the grounds are, basically, that there is no evidence in the record sufficient to support a finding, as required by the Patman Act, of an adverse competitive effect, either past or present or in the future. There is no evidence to support a finding that differentials that were shown by the record to have occurred from time between the California market and the Utah-Idaho market, in which the plaintiff competes, were not the result of the changing conditions affecting the market for the goods involved.

There was no evidence, your Honor, sufficient to support a finding by the jury that there was any impact upon the plaintiff by reason of any of the price differentials from time to time charged by Morton as between the California market and the Utah market. And there was, in our view, your Honor, no competent evidence of the amount of any

damages that might have been suffered by the plaintiff by reason of these Morton price differences, and that the jury could not have found any damages on the basis of the evidence which was adduced to it.

And there was ample evidence, your Honor, to support a finding by the jury, and we submit the jury should have been charged, in respect of the good faith of Morton in meeting an equally low price of the competitor, the competitor in the market, and particularly the plaintiff's own pies —that the jury could not have found that that price was not a price charged in good faith to meet an equally low price.

I should also state that, in our view, the jury was not properly charged, and the jury could not have found, that the actual differentials in price were the causal effect of any injury or damage to the plaintiff, any injury to competition in the market or any damage to the plaintiff in the market, that there was no showing of any connection, in other words, between the California prices and the prices of which the plaintiff complained.

Generally, your Honor, in respect of our motion for a new trial, we submit that there were various rulings made during the course of the trial relating to the disability of documents and interrogation of witnesses which we deem to have been in error. Of course, I have stated the grounds during the course of the trial, and your Honor is aware of them.

[fol. 1295] We submit that the verdict was against the weight of the evidence in the trial.

The damages awarded by the jury in respect to the one price differential that Morton was shown to have quoted were excessive in amount.

A further ground, your Honor, is the erroneous, in our view, admission or rejection of various evidence, most particularly with respect to the exhibit submitted through Mr. Gaylen Rigby, in which he was allowed to testify that he

had lost various sales by reason of these claimed violations. In our view that is complete hearsay, your Honor.

I will not state at this time the other rulings in particularity that we except to in support of our motion for a new trial.

A further ground in support of our motion for a new trial, your Honor, is that we deem that there was prejudicial conduct on the part of counsel in his constant attacks on counsel for Continental and in respect to discovery and in his constant mentioning of Mr. Vail before the jury. I think that is prejudicial to Morton in a jury context.

A further ground, your Honor, would be a failure of the court to order special verdicts, or general verdict on special interrogatories.

A further ground is the various jury instructions which we have submitted to your Honor were either erroneous or should have been—

The Court: What was that?

Mr. Schafer: Either erroneous, in our view, or should have been—

The Court: What was?

Mr. Schafer: The jury instructions.

The Court: All of them?

Mr. Schafer: Not all of them. I was going to state them. [fol. 1296] The Court: All right.

Mr. Schafer: In particular, your Honor, we of course again except to the instruction given yesterday in respect to the jury's query to the court, the failure to instruct on the meaning of the good faith defense and the failure to instruct on the meaning of the legal test of "substantial lessening of competition."

The Court: You took your exceptions to that yesterday.

Mr. Schafer: Excuse me?

The Court: You took your exceptions.

Mr. Schafer: That's right. I thought your Honor asked me just now to state with particularity these various jury instructions.

The Court: His Honor didn't ask you to do anything of the kind.

Mr. Schafer: I misunderstood you then.

I should note, in respect to the motion for a new trial, our exception to the admission of the various exhibits and testimony relating to sales below cost. We do not deem that that issue was relevant to any of the ultimate legal issues in the case.

In respect, also, to the motion for a new trial, I should note with particularity, I think, your Honor, my continuing concern over the admission of the testimony relating to the episode involving Mr. Chapman and Mr. Rigby and the possible prejudice, I think probable prejudice, which resulted to Morton by reason of the admission of that testimony.

Also, with respect to our motion for a new trial, we deem it was prejudicial to have admitted the interrogation of Mr. Kitchin respecting Bel Air pricing and cost data. None of that was relevant to any of the legal issues in the case, as I previously suggested to the court.

We have also excepted, with respect to our motion for a new trial, to the rulings respecting the testimony offered through Mr. Degenhardt, Mr. Henzke, and Mr. Smith relating generally to market facts of which they were competent, in my view, to testify.

[fol. 1297] We also, in support of our motion for a new trial, except respectfully to the restrictions that were placed upon the cross-examination of Mr. Gaylen Rigby.

Also Mr. Caldwell's exhibit respecting the cost evidence that was adduced. Your Honor will recall that our exception there was both irrelevancy and the fact that Mr. Caldwell had used cost data from another corporation to prove that Continental was selling below cost—or offering to sell below cost.

And the failure to admit into evidence the telegram from Mr. Halvarson to Mr. Chapman, which I think is Exhibit 6—I am sorry, not Mr. Chapman, but Mr. Kitchin, which I think is Exhibit 6, which in our view would have induced

the jury to find no evidence of any kind of intent to injure the Utah Pie Company.

And the failure to admit into evidence the various Continental interoffice memoranda, which we think were relevant and competent on the issues involved in the case.

We also would renew, your Honor, in connection with our motion for a new trial or for directed verdict, our motion for severance. We believe it was prejudicial to Morton, Continental, to have allowed the jury to consider a Patman Act case in the context of conspiracy charges.

I believe that covers my grounds, your Honor, for the motions for directed verdict, for judgment, n.o.v., and for a new trial.

The Court: The motions are denied, all three of them.

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Mr. Alioto: If your Honor please, apparently the question of the Sonny Boy discrimination in Spokane has been abandoned on the theory it couldn't possibly have any impact. Now he is talking about the difference in price between 3.70 and three dollars. There is no such difference in price in this record.

There is a record that the Frost 'N' Flame label, with all of the advertising, all of the services, performed by the Associated Grocers, sold at $3 where, for a period of time, a 3.70 price prevailed. But the testimony was that there was no advertising in connection with it to the same extent that Utah Pie was advertised, that there were no in-store [fol. 1298] demonstrations, there were no salesmen expenses in connection with the matter; so the very most that might have been found is that these folks, not keeping their full cost justification records, may have been off a penny or two in the matter. But there was no substantial amount of money that could have been found even in connection with that Frost 'N' Flame label as against the Utah label.

But, in any event, it is mandatory that there be some evidence of injurious impact upon this plaintiff in order for him to sustain a judgment even for nominal damages. The jury doesn't even reach the question of damages until it has decided the question of impact.

And on this record I say that there is a market share proportion to the plaintiff that begins in 1958 at a very low level and winds up in 1961 at something like two thousand per cent over that figure in 1958.

On that basis I submit there is simply no evidence of injurious impact upon Continental.

Mr. Schafer: Perhaps I didn't make myself clear, your Honor, in respect to the testimony relating to the Sonny Boy label, which your Honor probably recalls was sold up in Spokane, Washington.

I do not abandon that at all in any sense that that by itself was enough to support a jury finding of illegality. I am not abandoning it on that ground. I am simply here this morning asking your Honor, if your Honor is going to grant an injunction against Continental and that your Honor also grant an injunction against the plaintiff company, but I am limiting that request for an injunction to the marketing area of Salt Lake City, where the violations shown were violations among competing customers, as opposed to the territorial discriminations shown in respect to Spokane.

I don't conceive that we should request an injunction relating to the Spokane market, any more than I think that the plaintiff should request an injunction relating to the Salt Lake City market against Continental.

But in respect to illegality, the jury is clearly able to find on this record that the price in Spokane was itself a violation of law, but it also could find, and I am sure it did find, that the price in Salt Lake City among competing customers was by itself a violation of law. And that is the [fol.1299] issue that went to the jury on the form of the verdict. There was a $3.70 versus a $3 price difference and the jury could easily have found, your Honor, on the fragmentary testimony in the record, that there was no possible cost justification defense available to the plaintiff. And it is clear that the jury's finding, being what it was, was a finding that there was no cost justification.

I again submit to your Honor that there was ample evidence of injurious impact, which Mr. Alioto keeps mentioning. I won't restate my grounds for that. I think the jury clearly could have found injurious impact.

The Court: Is there anything futher anybody wants to say about this matter?

Mr. Schafer: Your Honor, I should say I want to make a motion in connection with the jury verdict on the counterclaim, as I did yesterday, for a judgment on the counterclaim and for costs to be awarded and for attorneys' fees to be awarded. And I move that attorneys' fees in the amount of twenty-five thousand dollars be awarded to Continental in respect of its counterclaim.

The Court: Well, yesterday, prematurely I said I granted those motions. I now vacate that order, and your motions are denied.

Plaintiff's motion for an order to enter judgment for the plaintiff on the counterclaim filed by the Continental Baking Company notwithstanding the verdict of the jury is granted.

Mr. Alioto: We ask leave, if your Honor please, to submit a form of motion on the basis of that minute order—we will submit a written form of judgment, rather.

The Court: Yes. Hand me up a judgment, and I will sign it for you. I don't believe there is any impact on this record on Continental.

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Filed Feb. 26, 1963.

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[fol. 1300]

DEFENDANTS' PROPOSED INSTRUCTIONS TO THE JURY

Come now the defendants in the above-entitled action to submit their Proposed Instruction to the Jury. The defendants wish to reserve the right to submit such additional requests for instructions during the course of or at the end of the trial as may seem necessary.

February 11, 1963.

Peter W. Billings, Attorney for Defendant, Carnation Company.
Paul Thatcher, Attorney for Defendant, Pet Milk Company.
A. Prat Kesler, Attorney for Defendant, Continental Baking Company.

Filed Feb. 25, 1963.

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Instruction No. 3

You are instructed that the plaintiff has failed to prove its charge that the Carnation Company discriminated in price in a manner violating the antitrust laws and you are therefore instructed that you must return a verdict in favor of Carnation on the charge that it independently violated the antitrust laws by discriminating in price.

(Not given.)

Instruction No. 6

With respect to plaintiff's claim against each of defendants individually, under the Clayton Act plaintiff has alleged that each has continuously charged lower prices in the Salt Lake market area and higher prices in the California markets near to their respective production facilities; that each defendant's lower prices in the Salt Lake area have been made possible because of higher prices [fol. 1301] elsewhere for the same products, and that these lower prices have been charged with the intent and purpose of injuring or destroying the plaintiff as a competitor.

In order for the plaintiff to prevail in this action, there are several elements that it must prove, and as to each it has the burden of proving the affirmative by a preponderance of the evidence. I will list these issues briefly at this time and describe them in more detail as I go on.

The first issue: Have the differences in the prices which you find to have been charged by each defendant for its

frozen pies during the period covered by this complaint been such as may have the effect of substantially lessening competition or tending to create a monopoly or injuring or preventing competition with such defendant?

If you find that the answer to the foregoing question is "no," or negative as to any one defendant, then you should return a verdict on this cause of action in favor of that defendant, and you need proceed no further with respect to this claim by the plaintiff against such defendant; but if you find that plaintiff has sustained his burden of proof as to this question then you have a second issue to determine, which is:

Have any lower prices charged by any of the defendants in the Salt Lake City market for 8" frozen fruit pies been shown to be dependent for their existence on higher prices charged for the same products in other markets?

If you find that the plaintiff has not proved as to one or more of the defendants that such defendant's prices in the plaintiff's trading area are interdependent in this way, you must find for that defendant. If you find that the plaintiff has sustained this burden, you must then determine the third issue, which is:

Have the differences in prices charged by the defendants, or by any one of them, been the result of price changes in response to changing conditions affecting the market for the goods concerned? If you find from a preponderance of the evidence that the plaintiff has established by a preponderance of the evidence that the difference in prices of any defendant at any time material to this case were not the result of price changes made from time to time in response to changing conditions affecting the market for such defendant's 8" frozen fruit pie products, then you may have a fourth issue to determine, which is:

[fol. 1302] Have the differences in the prices charged by any defendant at the times material to this case been only

such as to make due allowance for differences in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which such commodities are sold or delivered?

If you find from a preponderance of the evidence that such differences did make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered, then you should return a verdict in favor of such defendant, and again, regardless of the answers that you have made, or a determination you have made to any of the other questions I have stated.

If you find that such differences did not make only due allowance for such differences in costs, you have a fifth issue to determine, which is:

Have such price differences of any one of defendant been the proximate cause of any injury to the plaintiff's business or property?

If your answer to this question is "no", then again you should return a verdict for each such defendant with respect to this claim by the plaintiff and this is so regardless of what you may have found with respect to the first two issues. If your answer to this question is "yes", you may find for plaintiff under further instructions I will give you unless you also find that the defendant in question has proved by a preponderance of the evidence that the lower prices charged by such defendant which the plaintiff complains of in this case were charged in good faith to meet an equally low price of a competitor.

If you find from a preponderance of the evidence such prices were so charged in good faith for the purpose just stated, then you must return a verdict in favor of such defendant, regardless of the determinations you have made with respect to the other issues I stated previously.

(Not given.)

[fol. 1303] Instruction No. 7

The Clayton Act uses the words "price discrimination" and "discrimination in prices". In addition, you have heard counsel for the parties use these and similar phrases. I instruct you that the term "discrimination" as used in the statute means nothing more nor less than "price differences" and "differences in prices". Although in our everyday vocabulary the word "discrimination" has connotations of wrongdoing, such as in the field of racial discrimination, the word "discrimination" as used in the statute means exactly the same as the word "difference" and, of itself, has no connotation of wrongdoing. There is nothing illegal about a mere difference in price and, particularly, there is no requirement in the law that any defendant sell its pies at the same prices throughout the country.

FTC v. Anheuser-Busch, Inc., 363 U. S. 356 (1960)

In this connection you are instructed that none of the defendants have denied that from time to time they have charged different prices for their eight inch frozen fruit pies in the various western markets, but they do deny that such differences are illegal.

(Substance.)

Instruction No. 8

No antitrust statute requires that a company make the same amount of profit in all areas of the country in which it may sell its products, or on all the products it may sell. You have heard a great deal of discussion of profits made by each defendant and of the relation between profits made in different areas of the nation and on different products. On the facts shown in this case, such discussion has no bearing on the issues. There is no "profit equalization" law. Section 2(a) of the Clayton Act is a price discrimination statute, and has no bearing whatsoever on profits.

(Not given.)

Instruction No. 9

During the trial of this case you have heard considerable testimony as to whether the defendants, or any of them, [fol. 1304] sold at a profit or a loss in the plaintiff's marketing area. You are instructed that it is not unlawful in and of itself for the defendants or either of them, to make sales or offer to sell at a loss, and whether sales were made or offered at a loss is not one of the ultimate issues in the case, nor is it necessarily determinative of any of those issues.

In respect of the charge that the defendants have conspired to destroy the plaintiff in his business, the evidence as to sales below cost has been admitted only to permit you to consider whether such sales evidence the kind of parallel business behavior which will permit an inference of violation of law. I shall instruct you fully on this evidence as it relates to the conspiracy charge in a moment.

In regard to the charge made by plaintiff that each defendant has individually violated section 2(a) of the amended Clayton Act, the evidence of sales below cost has again been admitted for a limited purpose. The evidence is relevant only to the larger issue of whether any price differences of any defendant which you find have occurred may have the adverse effect upon competition which I have previously described. Thus, if the individual pricing decisions of any of the defendants were motivated by an unlawful intent to destroy competition, you may be permitted to find a reasonable probability that such an adverse effect upon competition may occur, and you may consider evidence of sales below cost in ascertaining whether any defendant had such an intent to destroy competition.

You are cautioned as to the evidence in this regard, however. The law permits you to infer an unlawful intent from evidence of sales below cost only if such sales are not explicable as normal business decisions of men moti-

vated by ordinary commercial considerations. Thus, you are to consider whether the sales or offers for sale were or were not the product of normal business judgment. If you find they were, you may not infer any prospect of substantial lessening of competition from their existence. Among the factors you should consider in determining whether some unlawful intent motivated these sales, are the following.

First, if you find that such sales or offers for sale were above the direct costs of the defendant's production and distribution for the particular sale or offer, although below total costs after allocation of fixed costs, you may not find that such sales or offers were motivated by unlawful intent to destroy competition in plaintiff's marketing area.

[fol. 1305] In the event you find that any defendant's sales were made below these direct costs you are not to infer an unlawful intent unless you find that the amount by which such sales were below these direct costs was substantial; that such sales or offers were consistent, constant, and deliberate; that they were made without competitive compulsion and not dictated by competitive conditions affecting the market area.

(Given in part in substance. Refused in part.)

Instruction No. 10

In order to make out a case against any one of the defendants individually plaintiff must sustain the burden of proving by a preponderance of the evidence that the effect of the geographical price differences upon which he relies may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or substantially to injure, destroy or prevent competition with the defendant in question. In other words, the amended Clayton Act does not make any and every difference in prices between various areas of the country illegal, but

only those differences which show a reasonable probability of having the adverse effects upon competition which I have described.

In deciding this question, you are instructed that the Act is concerned only with the general level of the competitive activity in the market and that the Act is not concerned with the welfare of any one competitor. Thus the issue is, not whether plaintiff may have been injured in some way individually by any defendant's competitive activity, but whether the facts indicate a reasonable probability of a substantial lessening of the over-all vigor of the competition with which the defendant is faced.

(Given in substance and partially. Refused in part.)

Instruction No. 11

In respect of any defendant's price differences, you are instructed that you may not consider the size of such defendant in making your determination on this issue. Mere size by itself is irrelevant to these issues and would be relevant only if such defendant had some monopoly or dominant power in some market which it could exploit in order to do the acts complained of by plaintiff. You are instructed that there has been no showing made in this case of any such dominant or monopoly power on the part of such defendant anywhere in the country.

(Not given.)

[fol. 1306] Instruction No. 12

In respect of any defendant's geographic price differences, and whether those differences may substantially injure, destroy or prevent competition with it, you may consider only the actual sales made at price differentials. Mere offers to sell have nothing to do with the Patman Act. As to sales actually made, you should consider the amount of the sales, if more than one, their extent in terms of the number of purchasers, how long they continued, how many of the customers as were sold were customers

of other suppliers, and how many of its sales represented new business to the industry as a whole.

(Given in part in substance. Refused in part.)

Instruction No. 14

In considering whether there has been, or may be, any diminution in the over-all level of competition in the relevant market, you should consider the relative amounts of the sales made by each of the defendants individually as compared with the sales of the plaintiff in this marketing area. You should also consider the nature of this business, including how these products are sold, the number of brands and companies competing in the market, the extent to which there is price competition among manufacturers of 8" frozen fruit pies, the fact that the total market for the products has been expanding, that new competitors are able to enter the market with no appreciable outlays of money or time. You are also to consider the growth of all the companies in the market, including plaintiff's growth, and whether plaintiff has competitive advantages by reason of the fact that it is the only local manufacturer of frozen pies in the Salt Lake City market. All of these matters are relevant to your consideration of whether competition in this market among producers has been increasing or decreasing, and whether it may be expected to increase or decrease in the foreseeable future.

(Substance.)

Instruction No. 15

You are instructed that in looking for the anticompetitive effect which I have described, you are to be concerned only with substantial injury to over-all competitive activity. [fol. 1307] The law is not concerned with either trivial or sporadic price differences. Minneapolis-Honeywell Regulator Co. v. FTC., 191 F. 2d 786 (7th Cir. 1951); Purex Corp., Ltd., 51 FTC 100, 116 (1954).

As our appellate court has stated on the question of injury to competition generally, the statute with which we are dealing is concerned with substantial impairment of the vigor or the health of the contest for business, regardless of which competitor wins or loses. The competition which is sought to be protected is the general contest between sellers for the buyer's business, because competition in its very essence is a contest for trade. Competition is a battle for something that only one can get; one competitor must necessarily lose. Antitrust legislation is concerned primarly with the health of the competitive process, not with the individual competitor who must sink or swim in the competitive enterprise. Atlas Building Products Co. v. Diamond Block Gravel Co., 269 F. 2d 950, 954 (10th Cir. 1959), cert. denied, 363 U. S. 843 (1960).

Thus you are instructed that the law is not concerned with mere shifts of business between competitors. The fact that one defendant may obtain some business from a particular customer or customers who may have been at the time customers of the plaintiff does not constitute the harmful effect which the statute prohibits. Nor do temporary over-all gains or losses by any one particular competitor by themselves constitute the injury at which the statute is aimed. In this connection, you are instructed that it is not illegal by itself for one competitor to cut his prices for the purpose of getting business from another competitor.

FTC v. Anheuser-Busch, Inc., 289 F. 2d 835 (1961)

Atlas Building Prods. Co. v. Diamond Block & Gravel Co., 269 F. 2d 950 (10th Cir. 1959), cert. denied, 363 U. S. 843 (1960)

Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356 (9th Cir. 1955), cert. denied, 350 U. S. 991 (1956)

Minneapolis-Honeywell Regulator Co. v. FTC, 191 F. 2d 786 (7th Cir. 1951), cert. dismissed, 344 U. S. 206 (1952)

Yale v. Towne, 52 FTC 1580 (1956)

Purex Corp., Ltd. 51 FTC 100 (1954)
General Foods Corp., 50 FTC 885 (1954)

(Not given.)

[fol. 1308] Instruction No. 17

In considering whether defendants' unlawful acts, if any, were the proximate cause of injury to plaintiff, should you reach this question, there are several matters you should consider, including the following:

First, you must consider whether the plaintiff's injury, if any, was caused by any act of the defendants, or any one of them or whether it was caused by the actions or failure to act of the plaintiff himself, or of other competitors in the market. In determining whether plaintiff's injury, if any, was proximately caused by the defendant or defendants, or by another competitor, or by the plaintiff itself, you may consider, for example, the plaintiff's own pricing system, whether the plaintiff acted as a reasonable businessman would act in attempting to retain his customers and maintain his prices, and whether the acts of competitors other than the defendants in the plaintiff's marketing area were responsible for, that is, were the proximate cause of, any part of the damage claimed by the plaintiff.

You may also consider whether plaintiff corporation acted as a reasonably prudent businessman anxious to avoid losses and maximize profits by pricing his products as low as he did, and in offering low prices to as many customers as he did. Any loss of business or profits by the plaintiff caused by the plaintiff's own lack of ability and salesmanship, or by poor management, or by its failure to do any of those things that might reasonably be expected of a businessman in the plaintiff's situation, cannot be found to be caused by the defendant or any of them. If, therefore, you should find that plaintiff's injury, if any, was caused by these or similar factors, or by legitimate

business competition on the part of the defendant, or defendants, or by acts of other competitors, then I charge your verdict should be for the defendants.

Second, in order to award any damages based upon any of the defendant's allegedly unlawful price discrimination, you must find that plaintiff's injury, if any, was caused by the difference in the prices charged by such defendant in different geographical areas and not merely by the price charged by such defendant in the Salt Lake City area. By this I mean that the injury, if any, must have been caused by the combination of the higher and lower prices; stated another way, if you are to find for the plaintiff, you must find that the differences in a defendant's prices in different areas were casually connected with one another so that the lower price in the Salt Lake City market was dependent upon a higher price in some other market.

[fol. 1309] FTC v. Anheuser-Busch, 289 F. 2d 835 (7th Cir. 1961)

Atlas Building Prods. Co. v. Diamond Block & Gravel Co. 269 F. 2d 950 (10th Cir. 1959), cert. denied, 363 U. S. 843 (1960)

Balian Ice Cream Co. v. Arden Farms Co. 231 F. 2d 350 (9th Cir. 1955), cert. denied, 350 U. S. 991 (1956)

Should you find, therefore, that a defendant's prices in the plaintiff's trading area would have been the same as they were regardless of what prices such defendant was charging elsewhere, then you must find that the injury, if any, suffered by the plaintiff was not proximately caused by the difference in the defendant's prices and you must find in favor of such defendant.

(Not given.)

Instruction No. 18

In addition to denying the plaintiff's claim that the differences between its prices in the plaintiff's trading area and its prices in other places had any of the harmful effects

on competition essential to a violation of the statute, and denying that these price differences caused any damage to the plaintiff, each of the defendants claims, as a defense, that any lower prices charged in the Salt Lake City market or other markets complained of by the plaintiff were charged in good faith to meet the equally low price of a competitor.

I specifically instruct you that should you find that the lower prices charged by any defendant were charged in good faith to meet the equally low price of the plaintiff, another defendant, or any other seller in the market, then you must find for such defendant regardless of your determination on any of the other issues presented.

The reason the law makes this exception is that the right of a seller to lower his price in good faith to meet the equally low price of a competitor is, in reality, the right to compete. To deny a seller the right to meet a lower price at which a competitor has offered to sell goods to a customer is in effect to deny the seller the right to compete with the competitor.

In this connection it makes no difference that a competitor reduces its price in good faith in order to obtain new business or in order to keep existing business. The law makes no distinction between these two situations. (Sunshine Biscuit, Inc. v. F.T.C., 306 F. 2d 48 (7th Cir. 1962). [fol. 1310] There are many legitimate reasons why a competitor might charge different prices in different areas of the country and not violate the antitrust laws. One of these reasons is to meet the equally low price of a competitor in one or more areas.

F.T.C. v. Anheuser-Busch, 289 F. 2d 835 (7th Cir. 1961)
Gerber Prod. Co. v. Beech-Nut Life Savers, Inc., 160 F. Supp. 916 (S.D.N.Y.) (1958)
Purex Corp., 51 F.T.C. 100 (1954)

In determining the question of good faith, it is not necessary that you agree with the seller's judgment as to how low a price was necessary, but only that you find the

decision one which would be considered reasonable by competent businessmen faced with a similar market problem. In short, it is enough for you to find that such defendant in good faith thought that its price was necessary to meet the plaintiff's price or any other competitor's price, and whether you yourself would have reached the same judgment is irrelevant.

In this connection you are instructed that more is required than merely a comparison of prices. What is relevant to the issues is the comparative attractiveness of the two products to professional buyers and price is only one factor. You are first to consider whether a competitive price on a "spot," or short-term basis is as desirable to buyers as a competitive price guaranteed to be available to buyers for a substantially longer term. Other marketing facts you are to compare in determining whether one defendant's products was offered in "good faith to meet an equally low" price of plaintiff or any other seller are the relative weights of the pies, whether one brand has an advantage over another by reason of being better known by consumers in Salt Lake City and its environs, whether in particular the plaintiff has advantages over the defendants by reason of being able to offer shipments in substantially smaller quantities than defendants and substantially more often, and whether the plaintiff's contracts to supply private label pies to certain customers give plaintiff competitive advantage with those customers.

(Not given.)

[fol. 1311] Instruction No. 19

In addition to claiming that its sales at lower prices in the Salt Lake City market where the plaintiff did business were made in good faith to meet an equally low price of a competitor, each defendant has claimed that these sales at the lower prices complained of were made in response to changing conditions affecting the market for its products.

I charge you that if such responses to changing conditions have been shown to exist no violation of the Clayton Act has been made out as to these price changes.

Should you find that the lower prices charged by any defendant were in response to changing conditions affecting the market for its products, then you must find for such defendant, and you must do so regardless of what you may find with respect to any of the other issues under the Clayton Act claim.

With respect to changing market conditions, you are instructed that the law does not require a corporation doing business in several marketing areas to charge the identical price for its goods in every one of these areas. The characteristics affecting the market for a product such as 8" frozen pies, in any one market such as the Salt Lake City market, may differ from time to time from the characteristics affecting any other market. These varying characteristics may include, for example, the entry of new competitors into a market, or the entry of new brands. In connection with this defense, defendants have stressed in particular the entry, starting in 1960 and continuing through 1961, of various private labels in the Salt Lake market, all at lower prices than the generally prevailing market price. If you find that any defendant's price changes were in response to the introduction of these cheaper pies, and that the introduction of these pies in 1960-61 constituted a "changed condition" affecting the market for 8" fruit pies, or that defendant's price changes were in response to any other changing market condition, then you should find for such defendant in respect of the Clayton Act claim.

(Not given.)

[fol. 1312] Instruction No. 20

You are instructed that cost justification is not an issue in this case except in respect of Pet's defense that its sales

of Belair label pies are lawful because any difference between pies of this label and goods of like grade and quality is cost justified.

Specifically, Morton has not asserted this issue. Morton has, moreover, not denied that from time to time, including June 1961, it has charged higher prices for its pies in the San Francisco market than it has charged to customers in the Salt Lake City market.

For these reasons, and the fact that the evidence does not show that Morton ever sold any pies to Safeway pursuant to its offer of May 22, 1961, you are instructed that you are not to consider any of the evidence regarding this offer on any of the material issues created by the charges against Morton individually, either as the evidence relates to Morton's price quotation to Safeway or to Morton's prospective costs of producing the products included in the offer to sell.

You are further instructed that the offer to Safeway by Morton cannot be construed by you to be evidence of the alleged conspiracy between Morton, Pet and Carnation.

You are not, therefore, to consider the evidence relating to Morton's offer to Safeway as any evidence of any unlawful acts of Morton as alleged by the plaintiff.

(Not given.)

Instruction No. 21

In determining the amount of damages, if any, proximately caused by the alleged individual violations of section 2(a) of the Clayton Act, you may only consider any net profit after taxes that you find by a preponderance of the evidence may have been lost by the plaintiff as a result of such actual sales made by such defendant as you find by a preponderance of the evidence were unlawful. You must further find by a preponderance of the evidence that plaintiff's lower net profit after taxes by reason of,

lost sales was the direct and natural result of the unlawful acts, if any, of such defendant. In this respect you are cautioned that it is only loss of net profits after taxes occasioned by actual sales made by a defendant that plaintiff can recover. If you find plaintiff has lost any sales [fol. 1313] as a result of any unlawful sales, you must then determine whether plaintiff has established with reasonable certainty by a preponderance of the evidence what his profits would have been and you must limit your award to this amount.

(Not given.)

Instruction No. 22

Plaintiff has also claimed to have lost profits by reason of having to sell its products at lower prices by reason of each of the defendants alleged unlawful lower prices. In considering this aspect of plaintiff's claim for damages you are to consider only those sales which plaintiff made at lower prices which you find it was forced to make by reason of sales actually made by a defendant. Mere offers by a defendant to sell at lower prices, not consummated by sales, are not a violation of the Robinson-Patman Act.

Shaw's Inc. v. Wilson-Johnes Co. 105 F. 2d 331 (3d Cir. 1939)

United States v. Borden Co., 111 F. Supp. 562, (D. C. Ill. 1953)

Package Closure Corp. v. Sealbright Co., Inc., 4 FRD 114 (D.C.N.Y.), rev'd on other grounds, 141 F. 2d 972 (2d Cir. 1944)

In determining whether plaintiff may recover on this second element of his claim of damages—i.e., for the sales he made at lower prices—you are further required to decide how low a price plaintiff was required to charge, and to how many customers he was required to sell at lower prices, by reason of sales actually made by a defendant. The mere fact that plaintiff made a number

of sales at a certain low price does not conclude this question. Plaintiff may have sold at a lower price than necessary, and he may have sold to more customers than was made necessary by a defendant's sales. You are to make your own determination of this issue in the light of what you find a reasonably prudent businessman intending to maximize his profits would have done in these circumstances. If you find that plaintiff exercised poor business judgment you are charged that the defendants are not chargeable with any losses caused by this poor judgment.

(Not given.)

Instruction No. 26

As I have already instructed you the plaintiff has failed to prove its claim of conspiracy. Therefore, the evidence [fol. 1314] introduced as to any one defendant cannot be considered by you as against any other of the defendants in connection with plaintiff's claim that the defendants individually engaged in unlawful price discrimination.

(Not given.)

Instruction No. 29

No finding of combination or conspiracy in violation of Section 1 of the Sherman Act may be made unless the jury are convinced by a preponderance of the evidence that the defendants have through conscious and concerted action or agreement undertaken together to eliminate the Utah Pie Company as a competitor.

You are charged that there is no direct evidence in this case of the existence of the conspiracy alleged by the plaintiff.

In the absence of direct evidence, plaintiff relies upon inferences drawn from circumstantial evidence to satisfy its burden of proving the existence of the alleged conspiracy.

Before a conspiracy can be proved by circumstantial evidence alone, it is necessary not only that the evidence show circumstances that permit you to infer that a conspiracy existed but also that the circumstances so shown be such that no other reasonable inference can be drawn from them. In other words, if two reasonable inferences can be drawn from the circumstantial evidence, one consistent with the existence of the conspiracy sought to be proved and the other consistent with a lawful explanation of the evidence, you may not infer the existence of the conspiracy from such circumstantial evidence.

[Pevely Dairy Co. v. United States, 178 F. 2d 363, 367 (8th Cir. 1949).]

Thus, the mere fact that some of the defendants may have done business in approximately the same way—in this case, for instance, the mere fact that the defendants may use delivered prices as a means of pricing and selling their products—does not permit you to infer a conspiracy. Similarly, the mere fact that one or another of the defendants may have followed another in raising or lowering prices on frozen fruit pies, if you found this to be a fact, is not necessarily evidence of conspiracy. The publication from time to time by two or more of the defendants of similar prices, or even identical prices, with knowledge that they were similar or identical, is not evidence of an agreement or conspiracy among the defendants, even if [fol. 1315] you should find this to be the fact. As the Court of Appeals for this Circuit has said, "the fact that competitors may see proper, in the exercise of their own judgment to follow prices of another manufacturer, does not establish any suppression of competition or show any sinister domination." Cole v. Hughes Tool Co., 215 F. 2d 924, 940-41 (10th Cir. 1954), cert. denied, 348 U. S. 927 (1955).

Parallel business behavior more often than not is the result of keen competition. In this industry, where products are substantially the same, where markets are local

and buyers few, where many lawful opportunities exist for communication of price information, and where the number of competitors is not great, no conspiracy may be inferred merely on the basis of consciously parallel business behavior of the type shown by this record.

Cole v. Hughes, supra

Morton Salt Co. v. United States, 235 F. 2d 573, 577 (10th Cir. 1956). (Criminal)

Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F. 2d 199 (3d Cir. 1961), cert. denied, 369, U. S. 839 (1962).

(Not given.)

Instruction No. 36

You are instructed that you are not to consider the evidence of the defendants' size, total sales volume, and the like in connection with any of the substantive issues of this case for two reasons: First, size, at most, is relevant to the issue of probability of future adverse competitive effects and, even as to this issue, size is meaningless unless it is coupled to a showing of market dominance or market leverage of some sort which could be employed to destroy competition in plaintiff's market. There has been no such showing of market power. Second, a prediction of future adverse effects cannot be made where, as here, the acts complained of were isolated and noncontinuing. Therefore, the issue as to which size might be relevant is not in the case.

(Not given.)

Instruction No. 36-A

The plaintiff has introduced evidence as to the size, total sales volume and overall profits of each of the defendants. [fol. 1316] The size, sales volume and profits of a corpora-

tion do not of themselves make that corporation a violator of the antitrust laws. Mere size, unaccompanied by any unlawful conduct, does not violate the law.

(Not Given.)

Instruction No. 37

You are instructed that you may not consider the fact that defendants have not called or made available more witnesses than they have from among their officers and employees as any evidence of any violation of law on the part of the defendants or any of them. The testimony of any such officer or employee was equally available to both sides to this litigation through the taking of depositions prior to trial, and many such depositions have in fact been taken.

Furthermore, plaintiff has not made out a prima facie case of conspiracy on the basis of facts of which any such person has been shown to have relevant and material knowledge.

de Pasquales v. Pennsylvania R. R. Co., 180 F. 2d 825 (3rd Cir. 1950)

Hoskyn & Co. Inc. v. Silver Line, Ltd., 63 F. Supp. 452 (S.D.N.Y. 1943) Aff'd. 143 F. 2d 462 (2d Cir. 1944)

Vanity Fair Paper Mills v. F.T.C., 1962 CCH Trade Cas. ¶ 70, 569 (2d Cir. 1962)

2 Wigmore 179 (3rd ed. 1940)

(Not Given.)

Instruction No. 39

You have heard testimony regarding the "projection of losses" in the budgets of some of the defendants. I instruct you that a budget is nothing more than an accountant's forecast as to what can be expected by way of profit or loss under the best marketing information that sales and management personnel can provide. The fact that a loss is forecast for a given period of time does not mean that a loss will necessarily result or that it is desired.

[fol. 1317] No inference of conspiracy can be drawn from the evidence relating to budgets presented in this case. The fact that losses on the sales of 8" frozen fruit pies may have been forecast in no way affects the question whether or not any defendant priced its pies in good faith to meet equally low prices at which competitors were selling their pies.

(Not given.)

Instruction No. 40

You have heard testimony with respect to a conversation between Mr. Stanley Chapman and Mr. Gaylen Rigby of the plaintiff corporation.

I now instruct you that Mr. Chapman at the time of this conversation with Mr. Rigby was, as a matter of law, not the agent or representative of the defendant Continental Baking Company; furthermore, there being no evidence that Mr. Chapman's conversation with the plaintiff was ever communicated by Mr. Chapman to the defendant Continental Baking Company, or that it had any connection with the June 1961 price reduction of which plaintiff complains, you may not consider Mr. Chapman's state of mind as any evidence against the defendant Continental Baking Company. In other words, Mr. Chapman's conversation and whatever personal feelings he may have had toward the plaintiff, if any, are of no relevance to any of the ultimate issues in this case, but is relevant solely to the question of what weight you shall give Mr. Chapman's testimony about other matters to which he testified.

Furthermore, this evidence may not be considered by you against Carnation or Pet.

With respect to the weight that you are to give Mr. Chapman's testimony in this case about the various matters at issue, you may find that Mr. Chapman's statements at that time were simply made in the heat of the moment, and that they evidence no continuing animosity toward the plaintiff. In that event you would be justified in disregarding this evidence altogether. If, on the other hand, you find from this

evidence that Mr. Chapman had a continuing animosity toward the plaintiff you would be justified in considering this factor in determining what weight you shall attribute to Mr. Chapman's testimony with respect to other matters that are in issue between the parties.

[fol. 1318] In connection with the weight you are to give Mr. Chapman's testimony on the other matters to which he testified, you are to recall that Mr. Chapman's testimony is substantially uncontradicted, and you are further to recall the evidence showing that Mr. Chapman did not feel any animosity towards plaintiff in June of 1961.

(Not given.)

Instruction No. 40-A

You may not consider the evidence of Mr. Chapman's statement as evidence against the Continental Baking Company unless you find that Mr. Chapman's statement evidenced a hostility toward the plaintiff, and that this hostility was shared by Continental Baking Company, and that this hostility toward the plaintiff was the cause of the acts of Continental complained of by the plaintiff. However, you are cautioned that you must take into consideration all the other evidence relating to Morton's intent toward plaintiff including, but not limited to the fact that the price reduction of which plaintiff complains did not occur until eight months after the dispute with plaintiff, that numerous other price reductions were offered by Morton without success, that when the price reduction was offered of which plaintiff complains, it was offered on only one of the seven items with which Continental competes with plaintiff, that Morton's co-packer continued throughout 1961 to sell raw materials to plaintiff, and that Morton cancelled orders it had received rather than follow plaintiff in a further price reduction.

(Not given.)

Filed Feb. 25, 1963.

## Defendant Pet Milk Company's Requested Additional Instructions

Ladies and gentlemen of the jury, you have submitted to the court the following question and requested me to instruct you further on the point of law involved. Your question is:

"A point of Discussion has arisen. Namely, is it unlawful for a pie producer to sell its pies near its plant and sell the same pies in another area at a lower price? In other words, is it unlawful for a company to sell, for example, pies in the Los Angeles market at $4 per dozen and at the same time sell pies in the Salt Lake area at $3 per dozen, the Salt Lake price not undercutting the competitor's prices in that area?" [fol. 1319] In answer to your question I instruct you that it is not unlawful for a pie producer to sell the same pies near its plant in California, as for example in Los Angeles, and at a lower price in another area, as in Salt Lake City, unless all of the following facts and conditions are also found by you to be true, as proved by a preponderance of the evidence before you:

(1) The pies are, as you assume in your question, of like grade and quality; and

(2) As I before instructed you, the reasonably probable effect of such selling at such different prices substantially is to lessen competition or tend to create a monopoly in any part of the commerce in frozen pies, or to injure, destroy, or prevent competition with the manufacturer who sells at such lower prices in Salt Lake City; and

(3) Such difference in price is not the result of making of only due allowances in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which the pies are delivered or sold to the purchasers in the two areas; and

(4) The different prices are not the result of price changes from time to time in response to changing market conditions, or changes in the marketability of the pies.

I further instruct you, as I did before, that even if you do find that the difference in price between the two areas was accompanied by all of the five additional facts just listed for you, still it would be a complete defense to the same, and the manufacturer's action would not be unlawful if you further find from a preponderance of the evidence that such lower price in Salt Lake City was made in good faith to meet an equally low price of a competitor in Salt Lake City.

Further, in respect to the assumption that you make in your question that the Salt Lake Competitor's prices are not undercut, this fact, if you find it to be true, may be considered by you, together with all the other evidence, in your determination of whether or not the low Salt Lake price of the California manufacturer was established with a predatory intent to injure the Salt Lake competitor, and also in your consideration of whether or not, and to what extent, if any, the Salt Lake competitor has suffered damage as the result of the price difference.

Respectfully requested

Paul Thatcher, Attorney for Defendant Pet Milk Company.

February 22, 1963
Filed Feb. 27, 1963

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[fol. 1320]

DEFENDANT CONTINENTAL BAKING COMPANY'S AND CARNATION COMPANY'S JOINT REQUESTED ADDITIONAL INSTRUCTION

Ladies and Gentlemen of the jury, you have submitted to the court the following question and requested me to instruct you further on the point of law involved. Your question is:

"A point of dissension has arisen. Namely, is it unlawful for a pie producer to sell its pies near its plant and sell the same pies in another area at a lower price? In other words, is it unlawful for a company to sell, for example, pies in the Los Angeles market at $4.00 per dozen and at the same time sell pies in the Salt Lake area at $3.00 per dozen, the Salt Lake price not undercutting the competitor's prices in that area?"

The answer to this question is that no lower price, such as $3.00 in Salt Lake City as against $4.00 in Los Angeles, is unlawful if it was charged in good faith to meet the equally low price of a competitor.

In connection with this issue it is only necessary that you find that a seller did reasonably think that the $3.00 price was necessary to meet competition in Salt Lake City, having regard for all the market factors of which there has been evidence in this case, and that such $3.00 price was in fact only "equally low." It is not necessary that you yourselves agree with the sellers' judgment as to what price was necessary, but only that you find the seller acted in good faith. If you do so find, you are instructed that the lower prices in Salt Lake City are lawful.

You are further instructed that even if you find that a $3.00 price in Salt Lake City was not offered in good faith to meet an equally low price, such price would not be unlawful unless you also find as to any price difference:

a. That the difference between the $4.00 price and the $3.00 price was reasonably likely to lessen substantially the competition among pie producers generally in the Salt Lake market; i.e., was there less competition among sellers in Salt Lake City as a result of the difference between the two prices, or may there be less competition in the future; and also unless you find

b. That the difference in the two prices was not the result of changing conditions affecting the market for frozen pies in the Salt Lake City area.

[fol. 1321] Thus, a $3.00 price in Salt Lake City, as against a $4.00 price in Los Angeles, is not unlawful, even if it does undercut a competitor's price, unless you find that such price differences may substantially lessen competition in the Salt Lake City market, and unless you find the lower price was not the result of changing conditions affecting the market for frozen pies.

Filed March 4, 1963

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NOTE TO COURT FROM JURY

Your Honor:

A point of dissension has arisen. Namely: Is it unlawful for a pie producer to sell its pies near its plant and sell the same pies in another area at a lower price. In other words, is it unlawful for a company to sell, for example, pies in the Los Angeles Market at $4.00/dozen and at the same time sell pies in the Salt Lake area at $3.00/dozen, the Salt Lake price not under cutting the competitors prices in that area.

The Jury

Frank (illegible)

Filed Feb. 25, 1963

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1322] Case No. 7306 docketed March 12, 1963. Cases Nos. 7308 and 7309 docketed March 14, 1963.

[fol. 1323]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ORDER GRANTING MOTIONS TO STAY INJUNCTION AND INJUNCTION STAYED PENDING APPEAL UNTIL FURTHER ORDER OF COURT—March 21st, 1963

Before Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges, and Honorable William E. Doyle, District Judge.

These causes came on to be heard on motions of Continental Baking Company, a Delaware corporation, Carnation Company, a Delaware corporation, and Pet Milk Company, a Delaware corporation, to vacate the permanent injunction or in the alternative to stay the injunction pending appeal in United States District Court for the District of Utah case No. C-148-61, Utah Pie Company, a Utah corporation, vs. Carnation Company, a Delaware corpora-
[fol. 1324] tion, Pet Milk Company, a Delaware corporation, and Continental Baking Company, a Delaware corporation, entered in this cause on February 23, 1963, John H. Schafer, Esquire, appearing for Continental Baking Company, George P. Lamb, Esquire, appearing for Pet Milk Company, Peter W. Billings, Esquire, appearing for Carnation Company, Robert W. Hughes, Esquire, appearing for Utah Pie Company.

On consideration whereof, it is now here ordered and adjudged by this court that the motions to stay the injunction against the above entitled parties in case No. C-148-61, Utah Pie Company, a Utah corporation, vs. Carnation Company, a Delaware corporation, et al., United States District Court for the District of Utah, pending appeal, be and the same are hereby granted, and that the injunction against the above parties be stayed pending appeal and until further order of this court.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the United States District Court for the District of Utah a certified copy of this order.

Dated this 21st day of March, 1963.

John C. Pickett, Circuit Judge, Oliver Seth, Circuit Judge, William E. Doyle, District Judge, Assigned.

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[fol. 1325]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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May Term—1965

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No. 7306

CONTINENTAL BAKING COMPANY, a Delaware corporation, Appellant,

v.

UTAH PIE COMPANY, a Utah corporation, Appellee.

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No. 7308

CARNATION COMPANY, a Delaware corporation, Appellant,

v.

UTAH PIE COMPANY, a Utah corporation, Appellee.

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[File endorsement omitted]

[fol. 1326]

No. 7309

PET MILK COMPANY, a Delaware corporation, Appellant,

v.

UTAH PIE COMPANY, a Utah corporation, Appellee.

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APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

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John H. Schafer (A. Pratt Kesler, and Roy M. Anderson, Gordon A. Thomas, Welborn & Dufford, Robert J. Muth, Covington & Burling, of counsel, on the briefs) for appellant, Continental Baking Company.

Peter W. Billings (G. Kenneth Handley, Jr., and James R. Baird, Jr., of counsel, on the briefs) for appellant, Carnation Company.

George P. Lamb (Lee, Toomey & Kent and Carrington Shields, Lee, Toomey & Kent, Gene Mayfield, Paul Thatcher, of counsel, on the briefs) for appellant, Pet Milk Company.

Joseph L. Alioto and Matthew P. Mitchell (G. Joseph Bertain, Jr., Robert W. Hughes and Maxwell M. Blecher, of counsel, on the briefs) for appellee, Utah Pie Company.

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[fol. 1327]

OPINION—Filed May 25, 1965

Before Murrah, Phillips and Lewis, Circuit Judges.

PHILLIPS, Circuit Judge.

Utah Pie Company[1] brought this action against Continental Baking Company,[2] Carnation Company,[3] and Pet Milk Company[4] under Title 15 U.S.C. (1958 Ed.) §§15 and 26.

The complaint charged that Continental, Carnation and Pet entered into a combination and conspiracy to restrain interstate commerce and monopolize such commerce in violation of §§1 and 2 of the Sherman Act (15 U.S.C.A. §§1 and 2), to be effected by destroying the competition of Utah Pie through the weakening of its capital structure and the destruction of its profits, and to violate §2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C.A. §13(a)), by price discriminations in the State of [fol. 1328] Utah, effected by selling their frozen pies at prices "below cost" in the State of Utah and at lower prices in such state than they charged for their frozen pies "in other western states."[5]

The case came on for trial in February, 1963. At the close of the evidence, each defendant properly moved for a directed verdict in its favor on the §2(a) claims asserted by Utah Pie. Each motion was denied.

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[1] Hereinafter called Utah Pie.

[2] Hereinafter called Continental.

[3] Hereinafter called Carnation.

[4] Hereinafter called Pet.

[5] Throughout the proceedings Utah Pie shifted from theory to theory as to the basis for its claims of §2(a) violations. In the complaint, the theory was lower prices in Utah than in other western states; at the pretrial, it was lower prices in six western states and higher prices in "another area"; at the trial, it apparently was lower prices in the Salt Lake City market (which we will hereafter define) and higher prices in the Los Angeles market; and the injunctive decree was apparently based on lower prices in five western states and higher prices in the entire State of California. Moreover, in Utah Pie's brief in No. 7308, Utah Pie relies on lower prices in five western states and higher prices in northern California.

[fol. 1329] The jury returned a verdict in favor of the defendants on the conspiracy claim and a verdict against each defendant on Utah Pie's §2(a) claims. Each defendant, in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, made a timely and proper motion to set aside the verdict against it and enter judgment n.o.v. in its favor on Utah Pie's §2(a) claims. Each motion was denied.

The jury also returned a verdict in favor of Continental on a counterclaim asserted by it, charging a §2(a) violation by Utah Pie. On Utah Pie's n.o.v. motion, the court set aside that verdict and entered judgment on the counterclaim in favor of Utah Pie, notwithstanding it had not moved for a directed verdict in its favor on the counterclaim.

On February 23, 1963, a judgment was entered for Utah Pie against each defendant for treble the amount of the [fol. 1330] verdict against it, and permanently enjoining each of the defendants from violating §2(a). Appeals from each of such judgments have been taken. The injunction portion of the judgment was stayed by this court, by order entered March 21, 1963.

The §2(a) claims and the conspiracy claim were tried at the same time and the evidence in support of them was commingled. Certain facts, if set out and considered in isolation, would present a distorted picture of these cases. To get a true perspective of them, the whole factual picture and the relation of each of the facts to each other must be brought into proper focus and considered together.

In each appeal, except Continental's appeal from the judgment in favor of Utah Pie on Continental's counterclaim, there is set up as a ground for reversal that the evidence was insufficient to support the verdict in favor of Utah Pie, or warrant the injunction. Since we conclude the judgments in favor of Utah Pie must be reversed on that ground, we shall not consider the other grounds urged for reversal.

[fol. 1331] Many of the facts relating to the §2(a) claims are pertinent in all of the appeals, and we will undertake

to set out a portion of such facts in a general statement of facts. We will then set out separately the facts particularly applicable in each of the respective appeals.

## I

## General Statement of Facts

The evidence in these cases covers the period 1958 to 1961, both inclusive. It is free from substantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof.

The offering prices, selling prices, sales volumes, percentages of market shares, earnings, and other like matters; the tables and charts which appear in this opinion; and the appendices annexed hereto are all based on uncontroverted documentary evidence, some of which was introduced by the plaintiff and some by the defendants.

The phrase "frozen fruit pies" is sometimes used in the frozen pie industry in a broad sense and as including [fol. 1332] frozen apple, cherry, boysenberry, peach, pumpkin and mince pies, although the latter two are not, strictly speaking, fruit pies. In its broad sense, the phrase does not embrace frozen cream pies, such as lemon cream, chocolate cream, coconut cream, and the like.

The frozen pies involved in these appeals are those embraced in the phrase "frozen fruit pies" in its broad sense.* We will hereafter refer to them simply as "frozen pies."

The phrase "frozen fruit pies" is also used in a more narrow sense, as embracing only the strictly fruit pies, and not including mince, pumpkin, or the cream pies. Frozen fruit pies in that narrow sense will be referred to hereinafter as "frozen fruit pies."

Utah Pie, a Utah corporation, owned and operated by the Rigby family, was in the fresh pie business for nearly

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*It was stipulated that the only frozen fruit pies involved in these cases were frozen apple, cherry, peach, boysenberry, mince and pumpkin.

30 years prior to 1957. It marketed its fresh pies in Salt Lake City and other points in Utah, in Las Vegas, Nevada, [fol. 1333] Grand Junction, Colorado, Farmington, New Mexico, Evanston, Wyoming, and at one other city in Nevada.

Faced with a declining volume and a substantial loss in its fiscal year ended October 31, 1957, Utah Pie, in the latter part of that year, entered into the frozen pie business.

It had much of the facilities needed for the frozen pie business in its old plant. It opened a new plant in 1958, which had a capacity, at least by 1961, on a three-shift basis, of 40,000 frozen pies a day, or about one and one-half million cases of frozen pies per year. There are six pies in a case. It had adequate refrigeration for fruit, production facilities, and storage of frozen pies. Its frozen pie business was well managed and its sales and transportation costs were low. It had the only frozen pie plant located in the Salt Lake City market, which enabled it to deliver to its customers frozen pies in small quantities.
[fol. 1334] The frozen pie business is comparatively new and highly competitive.

The six western states of California, Washington, Oregon, Utah, Arizona and Colorado embrace a portion of the Inter-Rocky Mountain and West Coast regions. In each of such states there are one or more separate and distinct frozen pie market areas, which comprise a large metropolitan center and the territory closely adjacent thereto. There are distinct frozen pie market areas in Los Angeles, San Francisco, Seattle, Portland, Spokane, Salt Lake City, Phoenix and Denver. The periphery of each of such market areas is nearly the same as that of the area in which its metropolitan newspapers circulate, that, because retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales. The current retail price in a particular market area at a particular time is generally fixed by the prices at which the chain stores and cooperative grocery organizations advertise their frozen pies in the

Thursday and Friday editions of the local newspapers, published and circulated in that market area.

[fol. 1335] During the period 1958 to 1961, inclusive, retailers of frozen pies in the Salt Lake City market advertised Utah Pie's brands a great many more times than they did brands of each of the other manufacturers selling in that market.[1]

[fol. 1336] The manufacturers and distributors of national brands, who sell throughout the United States, the manufacturers and distributors of regional brands, who sell in several of such local market areas, and sometimes a local manufacturer and distributor, whose single plant is located in a particular market area where his principal business is done, but who also may sell in other market areas in the same region, usually make up the group competing in a local market area. More than 30 different brands are sold in the six western states referred to above,

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[1] The following is a tabulation of frozen pie advertisements, which appeared in the Salt Lake City newspapers from 1958 through 1961.

| | 1958 | | 1959 | | 1960 | | 1961 | |
|---|---|---|---|---|---|---|---|---|
| *Brand* | *No. Ads* | *% of Total* | *No. Ads* | *% of Total* | *No. Ads* | *% of Total* | *No. Ads* | *% of Total* |
| Utah | 27 | 19.9 | 26 | 26.8 | 37 | 28.0 | 47 | 27.8 |
| Frost 'N' Flame | 0 | 0 | 4 | 4.1 | 22 | 16.7 | 25 | 14.8 |
| Mayfresh | 0 | 0 | 0 | 0 | 0 | 0 | 4 | 2.4 |
| TOTAL UTAH PIE | 27 | 19.9 | 30 | 30.9 | 59 | 44.7 | 76 | 45.0 |
| Pet Ritz | 26 | 19.1 | 13 | 13.4 | 2 | 1.5 | 0 | 0 |
| Swiss Miss | 0 | 0 | 0 | 0 | 6 | 4.5 | 10 | 5.9 |
| TOTAL PET | 26 | 19.1 | 13 | 13.4 | 8 | 6.0 | 10 | 5.9 |
| Carnation (Simple Simon) | 19 | 14.0 | 8 | 8.3 | 14 | 10.6 | 4 | 2.4 |
| Continental (Morton) | 0 | 0 | 3 | 3.1 | 1 | .8 | 5 | 2.9 |
| Bel-air | 0 | 0 | 7 | 7.2 | 14 | 10.6 | 12 | 7.1 |
| Others | 64 | 47.0 | 36 | 37.1 | 36 | 27.3 | 62 | 36.7 |
| TOTAL | 136 | 100.0 | 97 | 100.0 | 132 | 100.0 | 169 | 100.0 |

and the number of nation-wide manufacturers of frozen pies is over 200.

The brands, or labels, used by the parties to these appeals were as follows:

| | |
|---|---|
| Utah Pie | "Utah," "Frost 'N' Flame," "Mayfresh," and "Sonny Boy"; |
| Carnation | "Simple Simon"; |
| Continental | "Morton's"; |
| Pet | "Pet-Ritz" and "Swiss Miss." |

Utah Pie and Pet also manufactured frozen pies for Safeway Stories, Inc.,[8] under the latter's label, "Bel-air."

[fol. 1337] The price in a particular market area depends on the number and identity of the competing manufacturers, the competitive factors in such market, and the extent of the thrust or pressure of such factors at a particular time. A local manufacturer and seller, with his plant located in a particular market area, because of his low distribution and selling costs, preferences normally given to a local business, and his ability to sell and distribute frozen pies in either large or small quantities, is in a position to assert a very substantial competitive thrust and pressure, not present where there is no local manufacturer and seller competing in the area. Another competitive factor, which affects some local market area prices is the presence of private or controlled brands of frozen pies, which are usually sold by large retail chains and members of cooperative grocery organizations, and are purchased by them in large quantities at preferential prices. A controlled label is owned by the manufacturer, but sold to only one buyer in a [fol. 1338] particular market. A private brand is owned by the buyer and may be manufactured by one or more suppliers.

[8] Safeway Stores, Inc., with its headquarters in Oakland, California, owns and operates 1,852 food stores in 27 states and the District of Columbia, extending from the East Coast to the West Coast of the United States.

Because the competitive thrusts and pressures in a particular market area differ substantially from those at a given time in other market areas and change from time to time in the several market areas, the prices in each market area change from time to time independently of price changes in other market areas. Hence, the prices in the several market areas in such Intermountain and West Coast regions have little, if any, relation to each other and are not uniform. They vary from time to time and from market area to market area.

The Salt Lake City market area* comprises most of the State of Utah, southern Idaho, and small areas adjacent to Utah in the States of Wyoming, Colorado and Nevada. That market developed its own competitive pattern. No brand seemed to enjoy a consumer's loyalty, with the possible exception of Utah Pie's Utah brand. Pies were pur- [fol. 1339] chased primarily on a price basis. The prevailing retail price was fixed by the advertised week end specials appearing in the local newspaper advertisements of the grocers on Thursday and Friday.

In the first part of 1958, Utah Pie marketed its frozen pies in Utah and Idaho. It gradually extended its sales to other areas, so that by 1961 it was selling frozen pies in Utah, Idaho, Washington, Colorado and Wyoming. However, its sales outside of Utah and southern Idaho during the period involved in this law suit, 1958 to 1961, were negligible. See Appendix I attached hereto.

Utah Pie entered the field, as stated above, late in 1957, at least two years after Carnation, Continental and other manufacturers had introduced frozen fruit pies in the Salt Lake City market. Throughout the period here involved, Utah Pie's competitive emphasis was on price and except for a comparatively few instances, hereinafter noted, it sold its frozen pies at prices below those of its competitors.

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* Hereinafter referred to as the "Salt Lake City market."

[fol. 1340] In 1958, Utah Pie sold 75,939 cases[10] of frozen pies; in 1959, 76,744 cases; in 1960, 167,788 cases; and in 1961, 205,380 cases. During those four years its volume increased 270.5 per cent and its dollar volume in sales of frozen pies increased from $139,306.24 in the fiscal year ended October 31, 1958, to $407,841.25 in the fiscal year ended October 31, 1961, an increase of 292.8 per cent. Salaries paid the Rigby family engaged in the business increased by approximately $30,000 during those four years and net income before taxes, as adjusted, went from a loss of $1,264.51 in fiscal 1958 to a profit in fiscal 1961, before taxes, of $30,597.10. After taxes, it was $19,643.04, which was 28.5 per cent of its net worth.

In 1958, Utah Pie captured 66.5 per cent of the market. In 1959, while its volume increased, its share of the rapidly expanding market decreased to 34.3 per cent. In 1960, its sales volume more than doubled and its market share went up to 45.5 per cent. In 1961, its sales volume very sub-
[fol. 1341] stantially increased, as shown above, and its market share held at 45.3 per cent.

During the entire period involved in these cases, Utah Pie's sales volume and dollar sales substantially increased as did its profits except in 1958, and it enjoyed a very large percentage of the total sales volume in the Salt Lake City market, which percentage stabilized at about 45 per cent the last two years of the period. Throughout such period it was continuously a financially strong business concern and a healthy and effective competitor in the Salt Lake City market.

Utah Pie's phenomenal increase in sales of frozen fruit pies, an increase of 270.5 per cent in four years, came notwithstanding its sales efforts were almost minimal. Utah had but one salesman in the nine states in which it attempted to sell frozen fruit pies during the years 1958 to 1961. This salesman made only isolated trips to cities outside Utah Pie's immediate trading area, the Salt Lake City

[10] There are six pies in a case.

market. The company maintained no permanent sales [fol. 1342] force in such cities as Spokane, Seattle and Denver. It once had a broker in Portland, but apparently for only a short time. It made an effort to secure the account of Miller's Supermarket in Denver, but the Utah Pie salesman was told he would have to contact the chain's office in Chicago. No contact was ever made. The amounts spent on advertising during the years 1957 to 1961, inclusive, were comparatively small, and were as follows:

| | |
|---|---|
| In fiscal 1957 | $ 432.21 |
| 1958 | 3,431,71 |
| 1959 | 3,180.29 |
| 1960 | 7,160.63 |
| 1961 | 1,226.01 |

As will appear from the table which follows, the demand for frozen pies in the Salt Lake City market rapidly increased during the period 1958 to 1961, inclusive.

The following table is a composite picture of the total sales volume and the percentage of market shares of each party hereto and the other competitors in the Salt Lake City market in the years 1958 to 1961, inclusive.

[fol. 1343]

*1958* (Volume in dozens)

| *Company* | *Volume* | *% of Market* |
|---|---|---|
| Carnation | 5,863 | 10.3 |
| Morton | 754 | 1.3 |
| Utah Pie | 37,969.5 | 66.5 |
| Pet | 9,336.5 | 16.4 |
| Others | 3,137 | 5.5 |
| Totals | 57,060 | 100.0 |
| *1959* | | |
| Carnation | 9,625 | 8.6 |
| Morton | 3,182 | 2.9 |

| *Company* | *Volume* | *% of Market* |
|---|---|---|
| Utah Pie | 38,372 | 34.3 |
| Pet | 39,639 | 35.5 |
| Others | 20,911 | 18.7 |
| Totals | 111,729 | 100.0 |
| *1960* | | |
| Carnation | 22,371.5 | 12.1 |
| Morton | 3,350 | 1.8 |
| Utah Pie | 83,894 | 45.5 |
| Pet | 51,480 | 27.9 |
| Others | 23,473.5 | 12.7 |
| Totals | 184,569 | 100.0 |
| *1961* | | |
| Carnation | 20,067 | 8.8 |
| Morton | 18,799.5 | 8.3 |
| Utah Pie | 102,690 | 45.3 |
| Pet | 66,786 | 29.4 |
| Others | 18,565.5 | 8.2 |
| Totals | 226,908 | 100.0 |

[fol. 1344] Many frozen pie manufacturers gave rebates from their list of offering prices in the form of advertising allowances for stated periods, upon proof of advertising by the purchaser on tear sheets furnished to the purchaser for that purpose. There was no requirement as to size of advertisement, and the advertisement needed only to be run one time to qualify the purchaser for an allowance. The dollar amount of the allowance was not determined by the quantity of frozen pies purchased, nor by the size or frequency of the advertisement, and the small purchaser who advertised received the same allowance per case as the large purchaser. In effect, the advertising allowance is a discount and fixes the net per case price of the pies purchased.

We now turn to separate statements of the facts particularly applicable in each appeal. However, from time to time in each of such statements, facts will appear which obviously have general application in the other two appeals, but which we think can be better stated in the context of the statement wherein they appear.

[fol. 1345]

## II

## No. 7309

### Factual Statement in the Pet Appeal

Pet is a corporation engaged in the manufacture and sale of food products, including frozen pies. Its main office is in St. Louis, Missouri. Its frozen pie manufacturing plants are located in Frankfort, Michigan, Chambersburg, Pennsylvania, and Fresno, California.

Pet sells and distributes its pies from its three plants throughout the United States. From 1958 to 1962, inclusive, it was a competitor of Utah Pie in the Salt Lake City market. Pet entered the frozen pie business in 1955, by the acquisition of a frozen pie plant at Beulah, Michigan. Initially, its pies were made in four flavors and distributed in a relatively small north central territory, the Detroit-Chicago-Milwaukee area. In order to expand its frozen pie business nationwide, Pet moved its plant from Beulah to Frankfort, and then in 1956 acquired its plant at Fresno, and in 1957 its plant at Chambersburg. It marketed its pies under the brand, Pet-Ritz. It added new flavors and undertook to accelerate consumer acceptance and demand [fol. 1346] through an extensive advertising campaign, which emphasized the quality of its pies. This advertising included advertising in local newspapers, distribution of coupons that might be used in purchasing pies, and demonstrations in grocery stores to show how easily the pies could be prepared for consumption. It also included a large expenditure for advertising on a half-hour television program, starring Red Skelton.

Soon after Pet entered the frozen pie industry, the nature of the market began to change. As frozen pies became more and more in demand, numerous regional or local companies, such as Utah Pie, entered the business. Because of the freight advantage, which they had over the national companies, whose products usually had to be shipped into a region from a distance, the local and regional companies were able to sell at lower prices than the national companies had been charging. Emphasis in many regional markets shifted from quality to price, and price became the principal factor of competition. With the increase of price competition, prices of frozen pies declined.

[fol. 1347] During 1957 and 1958, while prices were declining and the market was expanding, Pet's sales of frozen pies did not keep pace with the expanding market. In the Salt Lake City market, total sales in 1959 were 1.96 times total sales in 1958, while sales of Pet-Ritz pies were 1.52 times sales in 1958; total sales in 1960 were 1.64 times total sales in 1959, while Pet-Ritz sales were 0.58 times sales in 1959; and total sales in 1961 were 1.24 times total sales in 1960, while Pet-Ritz sales were 0.46 times sales in 1960.

During the period 1958 to 1961, inclusive, the total sales of Pet-Ritz pies were the following percentages of all brands of frozen fruit pies sold in the Salt Lake City market: 1958—16.4 per cent; 1959—12.7 per cent; 1960—4.5 per cent; 1961—1.7 per cent. The decrease was due to the fact that other brands were being sold below the Pet-Ritz price in that market.

When Pet realized that advertising efforts were not enough to check its continuing decrease in sales, it made William N. Harsha, who had been the managing director of Pet's Canadian corporation, general manager of the [fol. 1348] Pet-Ritz Frozen Foods Division. It assigned him to different divisions of Pet to study its operations and financial and production problems. After a review and study of Pet's operations, Harsha decided to curtail the advertising and effect economies by eliminating duplication in overhead, increasing processing efficiency, im-

proving production methods, reducing warehousing costs, and reducing freight costs by better scheduling of deliveries. Pet also decided to make an analysis of the frozen pie market to determine what kind of pie the housewife preferred. It was then known that the housewife was price conscious, but Pet, having spent large sums in advertising the Pet-Ritz brand as a quality product, did not want to reduce the quality of that pie to enable it to compete with lower-priced pies. As part of the effort to analyze the market, a research director was employed, who began his studies in June, 1959. Soon thereafter, the Market Research Corporation of America was engaged to make a study to help Pet decide whether or not to add a smaller and lighter economy brand of frozen pies. The result of these [fol. 1349] studies indicated that there was a market for a frozen economy pie and Pet introduced its Swiss Miss pie in Denver in April, 1960, and elsewhere in the United States, including Utah, in August, 1960. Swiss Miss is an eight-inch, 20-ounce pie. Utah Pie's brands are all eight-inch, 24-ounce pies. While it did not fully meet the price competition, it enabled Pet to compete more effectively, improved the profit picture of the frozen foods operation, and restored some of Pet's distribution with major chains.

In addition to adding the lighter-weight, lower-priced Swiss Miss to its line of fruit pies to improve its competitive position, Pet also entered into negotiations with Safeway Stores, Inc., for the production for it of frozen fruit pies under the Bel-air label. It sold Safeway 25,462.5 dozen Bel-air frozen fruit pies in 1959, and in December of that year secured a contract to supply Safeway with Bel-air frozen fruit pies during 1960. Under this contract, Safeway agreed to purchase not less than 500,000 dozen and not more than 1,000,000 dozen frozen fruit pies in 1960, [fol. 1350] and Pet agreed to manufacture and deliver such pies to Safeway.[11] The minimum quantity was stipulated,

[11] Under such contract, Pet was to furnish Safeway's requirements of Bel-air frozen fruit pies for all of its food stores and shipments were to be made from the Pet plant nearest the point of delivery.

because Pet had to buy new equipment to handle the added production, and assurance of a minimum purchase was needed to compensate for the cost of the equipment.

Exhibits introduced by Utah Pie reflect cost studies made of Bel-air frozen pies sold by Pet to Safeway. They show Pet's costs of manufacture, sale and delivery of such pies were $0.4980 less than such costs of like pies sold under its regular labels, and that the difference in price to Safeway of such Bel-air pies and the price such like pies sold to other customers was only $0.4275. The difference in cost justified the difference in price under the cost justification proviso in §2(a) of the Clayton Act (15 U.S.C. §13(a)).

Safeway regularly followed the practice of requiring the sellers of its frozen pies to justify any reduction in price to it by a showing of cost difference. It did so with respect [fol. 1351] to the sales of Bel-air pies to it by Pet, under the December, 1959 contract, by an express provision therein so requiring.

Simultaneously with such efforts to cut costs and improve volume of sales, Pet, in 1958, began to reduce its advertising expenditures for frozen pies. From $866,116 in 1959, its advertising expenditures were reduced to $337,510 in fiscal 1961, and to $42,562 in fiscal 1962.[12]

By the time the present case came on for trial, Pet's frozen food division, the chief operation of which was the production of frozen fruit pies, was making a net profit.

The Pet-Ritz pies were always sold in the Salt Lake City market at prices substantially higher than the prices at which the pies of Utah Pie, all of which were of the same weight and quality as Pet-Ritz, were sold.

[fol. 1352] In August, 1960, when the first Swiss Miss apple pie was sold in the Salt Lake City market, the price thereof was $3.29 per dozen. At the same time, the larger and heavier Frost 'N' Flame applie pie of Utah Pie was

[12] On April 1, 1960, Pet changed its fiscal year for accounting purposes from the calendar year to a year ending March 31. Consequently, there is no fiscal 1960 in its accounting.

sold at a price of $3.00 per dozen. Thereafter, during the period covered by this action, the Swiss Miss apple pie ranged in price from $3.24 to $3.38 per dozen, while the Frost 'N' Flame apple pie ranged in price from $2.75 to $3.10 per dozen.

Except during the periods or months hereinafter noted in this paragraph, the prices at which the Swiss Miss frozen pies were sold were always higher than the prices at which the larger and heavier Frost 'N' Flame pie were sold in the Salt Lake City market; and even in such periods or months the prices of Swiss Miss were higher than the prices of Frost 'N' Flame on an ounce-for-ounce basis; and professional buyers for resale always take into consideration differences in size and weight. In the period September, 1960, through November, 1961, the price of the Swiss Miss cherry pie, if difference in weight be disregarded, was lower than the price of Frost 'N' Flame cherry pie. That was true of Swiss Miss peach pie in August and [fol. 1353] October, 1960, and January, February, March, June and September, 1961, and of Swiss Miss boysenberry pie from August, 1960, through December, 1961. It was never true of Swiss Miss apple pie.

Gaylen Rigby testified for Utah Pie, as follows:

> "• • • with all of our advantages that we had, • • • we knew that we could not enter the market unless we could come up with a price that would interest the wholesalers in putting in our product. We knew we'd have to be *a few pennies under our competition* because of our locale." (Emphasis supplied.)

In January, 1958, the first date that comparative prices are shown in the record, Utah Pie's prices, instead of being a few pennies, were from 68 cents to $1.24 per dozen lower than the price of Pet-Ritz pies, the only pies Pet was then selling in the Salt Lake City market. In that month, in that market, Utah brand frozen apple pies were sold at a price of $4.15 per dozen; while Pet-Ritz frozen apple pies were sold at prices ranging from a low of $4.84 per dozen,

to a high of $5.00 per dozen. During 1958, the Pet-Ritz frozen apple pies were sold at wholesale in that market at prices that were approximately $1.00 per dozen higher than the prices at which Utah brand apple pies were being sold by Utah Pie. During 1959, the difference ranged from [fol. 1354] 12 cents to 62 cents per dozen; during 1960, from 54 cents to $1.28 per dozen; and during 1961, from 58 cents to $1.89 per dozen.

Plaintiff's Exhibit 112 reflects the price lists and special deals offered by Pet in Wyoming, Washington, Utah, Oregon, Montana, Idaho, Colorado, southern California and northern California in 1958, 1959, 1960 and 1961. A chart annexed hereto as Appendix II analyzes month by month the lowest absolute price offered by Pet for apple pie in each of such markets. By lowest absolute price is meant the list price, less any deals offered, whether direct discounts from the invoice price or advertising allowances. Apple pie figures are used, because it is the volume leader, sells at the lowest price of the frozen pies, and is the price indicator.

The chart shows the following:

Pet's absolute price for apple pie was uniform in Wyoming, Utah, Montana, Idaho and Colorado from January, 1958, through November, 1959; at no time during that period was Pet's price in Utah lower than its price in any of the other market areas; and during such period Pet's [fol. 1355] lowest price was always in northern California, southern California, Washington, or Oregon.

In December, 1959, Pet's Utah price was $3.80 per dozen, while its price in Wyoming, Washington, Oregon, Montana and Colorado was $4.00 per dozen, but in that same month Pet offered apple pie in northern California for $3.70 per dozen and in southern California for $3.60 per dozen.

During four months in 1960, Pet charged less for apple pie in Utah than it did in some of its other market areas, but at all times during 1960, Pet's Utah price was higher than its price in southern California and was the same or higher than its price in northern California.

In January and February, 1961, Pet's lowest offering price for apple pie was $3.70 per dozen and was made in Utah, Montana and Colorado; in March and April, 1961, Pet's lowest offering price for apple pie was $3.56 per dozen and was made in Utah, Montana and Idaho; and from May through August, 1961, Pet's apple pie price in Utah was the same or higher than its apple pie prices in its other market areas.

[fol. 1356] Thus, in only nine of the 44 months here involved, was Pet's price for apple pie lower in Utah than in any of its other market areas, and in only four months, January, February, March and April, 1961, was Pet's price in Utah the lowest of any of its other market areas.

Furthermore, a comparison of Utah Pie's absolute apple pie prices, shown by its Exhibit 91, and set forth in a chart annexed hereto as Appendix III, and Pet's lowest absolute prices, reflected in Appendix II, shows that at no time during the 44-month period of May, 1958, through December, 1961, were Pet's Utah prices lower than Utah Pie's prices.

Pet introduced a machine tabulation of invoices of actual sales of frozen fruit pies by it to customers in seven cities in the western states, during the period from May, 1958, through December, 1961. The seven cities were selected because most of Pet's frozen fruit pies sold in the western states are sold through wholesalers in these cities.

Pet's Exhibit A-40 has particular relevancy to Utah Pie's allegation of territorial price differences, namely, [fol. 1357] that Pet charged lower prices for its frozen fruit pies in the Salt Lake City market than it charged in the market area in which its pies were made or in other western markets. It shows the lowest invoice prices at which Pet-Ritz frozen apple pies were sold in Salt Lake City and the six selected cities, and we reflect the pertinent part thereof in a chart annexed hereto as Appendix IV.

During the period covered by the tabulation (44 months in all), the lowest price at which Pet-Ritz frozen apple pies were sold by Pet to wholesalers in Salt Lake City was

lower than the lowest price at which such pies were sold by Pet to wholesalers in Los Angeles, in only three months —December, 1959, March, 1961, and April, 1961. The following table lists these prices, as well as the lowest price at which Utah Pie sold frozen apple pies under its Utah brand in Salt Lake City in the same months:

*Lowest Price Charged for a Dozen Frozen Apple Pies*

| | Pet-Rits | | Utah Pie |
|---|---|---|---|
| | Los Angeles | Salt Lake City | Salt Lake City |
| December, 1959 | $ 3.90 | $ 3.84 | $ 3.60 |
| March, 1961 | 4.26 | 4.24 | 3.10 |
| April, 1961 | 4.26 | 4.08 | 3.50 |

[fol. 1358] During the same period, the lowest price at which Pet-Ritz frozen apple pies were sold by Pet to wholesalers in Salt Lake City was lower than the lowest price at which such pies were sold by Pet to wholesalers in San Francisco in only seven months—December, 1959, August, 1960, September, 1960, January, 1961, February, 1961, March, 1961, and April, 1961. The following table lists the lowest prices at which Pet-Ritz pies were sold in each of the cities during these months, and the lowest price at which Utah Pie sold its 24-ounce Utah brand frozen apple pies in Salt Lake City during those months:

*Lowest Price Charged for a Dozen Frozen Apple Pies*

| | Pet-Rits | | Utah Pie |
|---|---|---|---|
| | San Francisco | Salt Lake City | Salt Lake City |
| December, 1959 | $ 4.00 | $ 3.84 | $ 3.60 |
| August, 1960 | 4.40 | 4.28 | 3.50 |
| September, 1960 | 4.40 | 4.28 | 3.16 |
| January, 1961 | 4.40 | 4.28 | 3.48 |
| February, 1961 | 4.40 | 4.28 | 3.50 |
| March, 1961 | 4.40 | 4.24 | 3.10 |
| April, 1961 | 4.48 | 4.08 | 3.50 |

The number of Pet-Ritz frozen apple pies sold in Salt Lake City at such lower prices is almost inconsequential. They were as follows:

| | | | |
|---|---|---|---|
| December, 1959 | 125.0 dozen | February, 1961 | 27.5 dozen |
| August, 1960 | 45.0 dozen | March, 1961 | 27.5 dozen |
| September, 1960 | 52.5 dozen | April, 1961 | 25.0 dozen |
| January, 1961 | 12.5 dozen | | |
| | | Total | 315.0 dozen |

[fol. 1359] The introduction of the "economy" Swiss Miss pie by Pet to enable it to compete with lower-priced pies in various markets has been discussed earlier. One question with respect to that pie remains. Was it sold at lower prices in the Salt Lake City market than in California, where the pies were manufactured? Utah Pie introduced no evidence whatsoever to sustain any burden of proving lower prices for Swiss Miss pies in the Salt Lake City market. The Swiss Miss pie was first sold in Salt Lake City in August, 1960. The present complaint was filed in September, 1961. Exhibit A-40 also shows all the actual sales of Swiss Miss pies in such seven western cities in 1960 and 1961, and we reflect the pertinent part thereof in that respect in a chart annexed hereto as Appendix V. During only one of the intervening 13 months was the lowest price at which the Swiss Miss apple pie was sold in Salt Lake City lower than the price at which the pie was sold in San Francisco and at no time was the price in Los Angeles higher than the lowest price in Sale Lake City. In addition, during this entire period, the price of the [fol. 1360] Frost 'N' Flame pie, manufactured by Utah Pie, was always lower than the price of the lighter (by four ounces) Swiss Miss pie. The following tabulation permits a comparison of the prices.

LOWEST PRICE PER DOZEN—APPLE PIES

| | Salt Lake City | Swiss Miss Los Angeles | San Francisco | Frost 'N' Flame Salt Lake City |
|---|---|---|---|---|
| August, 1960 | $3.29 | $3.05 | $3.29 | $3.00 |
| September | 3.35 | 3.05 | 3.17 | 3.00 |
| October | 3.25 | 3.05 | 3.17 | 3.10 |
| November | ----* | 3.05 | 3.05 | 3.10 |
| December | ---- | 3.05 | 3.29 | 3.10 |
| January, 1961 | 3.29 | 3.05 | ---- | 3.10 |
| February | 3.25 | 3.05 | ---- | 3.10 |
| March | 3.25 | 3.05 | ---- | 3.10 |
| April | 3.25 | 3.05 | ---- | 3.10 |
| May | 3.25 | 3.05 | 3.29 | 3.10 |
| June | 3.25 | 3.05 | 3.21 | 2.75 |
| July | 3.29 | 3.05 | 3.29 | 2.75 |
| August | ---- | ---- | 3.17 | 2.75 |

*____ indicates no sales were made in the month.
Even when Utah Pie's prices for Frost 'N' Flame were down to $2.75 per dozen in July and August, 1961, it made a profit on its sales thereof.

In 1958, Utah Pie sold 37,969.5 dozen frozen pies in the Salt Lake City market, which was 66.5 per cent of the total sales volume. In 1958, Pet sold 9,336.5 dozen frozen pies [fol. 1361] in that market, which was 16.4 per cent of the total sales volume. In 1958, neither Utah Pie nor Pet sold any Bel-air pies to Safeway.

In 1959, Utah Pie sold 38,372 dozen frozen pies in that market, which was 34.3 per cent of the total sales volume. In 1959, Pet sold 39,639 dozen frozen pies in that market, which was 35.5 per cent of the total sales volume. However, in 1959, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway and Pet sold in that year 25,462.5 dozen Bel-air frozen fruit pies to Safeway. Pet's market share, or percentage of total sales volume in that year, with

frozen fruit pies sold to Safeway excluded, was 12.7 per cent.

In 1960, Utah Pie sold 83,894 dozen frozen pies in that market, which was 45.5 per cent of the total sales volume. In 1960, Pet sold 51,480 dozen frozen pies in that market, which was 27.9 per cent of the total sales volume. However, in 1960, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway, while Pet sold 22,694 dozen Bel-air [fol. 1362] frozen fruit pies to Safeway, and Pet's market share, or percentage of the total sales volume, with the frozen fruit pies it sold to Safeway excluded, was 15.6 per cent.

In 1961, Utah Pie sold 102,690 dozen frozen pies in that market, which was 45.3 per cent of the total sales volume. In 1961, Pet sold 66,786 dozen frozen pies in that market, which was 29.4 per cent of the total sales volume. However, in 1961, in that market, Utah Pie sold no Bel-air frozen fruit pies to Safeway, while in that year Pet sold Safeway 14,897.5 dozen frozen fruit pies, and Pet's market share or percentage of total sales volume, with the frozen fruit pies sold by it to Safeway excluded, was 22.9 per cent.

We have shown Pet's share of the market, with Bel-air frozen fruit pies excluded, in 1959, 1960, and 1961, because it was clearly established by uncontradicted and uncontroverted evidence that Safeway was not willing in those years to purchase frozen fruit pies from Utah Pie, for the reason that it was unable to persuade Utah Pie to install means and procedures that would insure uniform [fol. 1363] quality of Bel-air frozen fruit pies produced by Utah Pie and sold by it to Safeway. In other words, Safeway imposed as a condition to its purchase of any Bel-air frozen fruit pies from Utah Pie that such installations be made by Utah Pie. The primary reason Safeway imposed such conditions was that it was unwilling to risk damage to the fine reputation it was building up for Bel-air frozen fruit pies by the maintenance of a constant high quality of such pies, through the unwitting sale by it of Bel-air pies, the quality of which fell below such high standard of quality.

Other reasons are set forth in subjoined note 13. It follows that Pet's sales of Bel-air frozen fruit pies to Safeway in 1959, 1960, and 1961 took no frozen fruit pie business away from Utah Pie. If Pet had not sold the Bel-air frozen [fol. 1364] fruit pies to Safeway in those years, the latter would have purchased them from some other manufacturer than Utah Pie, who was willing to meet Safeway's manufacturing conditions and requirements.[14]

In 1958, the market share of sellers in the Salt Lake City market, other than Utah Pie's and the defendants', was 5.5 per cent, and in 1959 it increased to 18.7 per cent, a gain of 13.2 per cent. The aggregate of such 13.2 per cent and the 22.8 per cent of Pet's market share attributable to Bel-air sales in 1959 more than equals the percentage of market share decrease of Utah Pie in 1959 from 1958. Moreover, Pet's share of the market, exclusive of its sales of Bel-air pies to Safeway, was only 12.7 per cent of the total market share, in 1959, while its share in 1958 was 16.4 per cent, and that included the sales of all kinds of [fol. 1365] frozen pies. The loss Utah Pie suffered in market share in 1959 was not attributable in anywise to Pet's competition.

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[13] In 1960, Safeway discovered that the Bel-air frozen pumpkin pies being furnished it by Utah Pie were below the quality the latter had agreed to maintain, both as to excess moisture content of pumpkin pies and the non-conformity of ingredients to stipulated formulas for both pumpkin and mince pies, and notwithstanding it had also agreed so to do, had failed to install a coding device by which Safeway could pinpoint a defective pie, even to the day of its production.

[14] While Safeway would not purchase frozen fruit pies packed under its Bel-air label from Utah Pie, for the reasons stated above, it was a large purchaser of other frozen pies from Utah Pie. Utah Pie sales of other frozen pies to Safeway were approximately 31,500 dozen in 1958, 16,500 dozen in 1959, 22,000 dozen in 1960, and 18,000 dozen in 1961.

In the years 1958 to 1961, inclusive, Pet sold no mince nor pumpkin Bel-air pies to Safeway.

In 1960, Utah Pie sold 4,608.5 dozen frozen mince and 5,336.5 dozen frozen pumpkin Bel-air pies to Safeway. In 1961, Safeway requested Utah Pie to pack its Bel-air mince pies in a new carton. Utah Pie advised Safeway it would not do so, unless it was given Safeway's frozen fruit pie business, then going to Pet. That Safeway would not do. As a result, Safeway only purchased 50 dozen frozen mince pies from Utah Pie in 1961, just enough to let Utah Pie use up the old cartons and shipping cases it had on hand, but it purchased 6,483 dozen Bel-air frozen pumpkin pies from Utah Pie in that year. This further shows that Utah Pie's failure to sell frozen pies to Safeway was not due to competitors' prices, but to Utah Pie's unwillingness to meet Safeway's requirements.

Pet's market share, exclusive of Bel-air frozen fruit pies sold to Safeway, increased in 1961 over 1960, 7.3 per cent, but uncontroverted facts show that gain did not result [fol. 1366] from a loss by Utah Pie. In 1960, Utah Pie sold 4,608.5 dozen Bel-air mince pies to Safeway. Due to its unwillingness to use the new type carton Safeway requested, it sold Safeway only 50 dozen mince pies in 1961. It is apparent that no problems with respect to new cartons existed as to pumpkin pies, because Utah Pie sold Safeway 1,146.5 more pumpkin pies in 1961 than it did in 1960. The only reasonable inference is that had Utah Pie been willing to adopt the new carton for mince pies, it would have sold Safeway at least as many mince pies in 1961 as it did in 1960, and had it done so, its market share in 1961 would have been 46.8 per cent, instead of 45.3 per cent. In 1960, Pet's Swiss Miss sales accounted for 11.1 per cent of the total sales in the Salt Lake City market, while its Pet-Ritz sales accounted for only 4.5 per cent thereof. In 1961, Pet's Swiss Miss sales accounted for 21.2 per cent of the total sales in such market, while its Pet-Ritz sales accounted for only 1.7 per cent thereof. Pet's increase in market share in 1961 was due solely to the increase in its sales of Swiss Miss pies, and that pie, on [fol. 1367] an ounce-for-ounce basis, was always sold at

a higher price than Utah Pie's Frost 'N' Flame pie. In only one month, May, 1961, was Swiss Miss sold at a higher price in San Francisco than in Salt Lake City.

Moreover, the market share percentage of sellers in the Salt Lake City market, other than Utah Pie and the defendants, decreased 4.5 per cent and their sales volume decreased 4,902 dozen in 1961; and it is reasonable to infer that Pet's market share increase in 1961 derived from such decreases suffered by such other sellers. But in view of the fact that Utah Pie had a substantial sales volume increase in 1961 and would have had a market share percentage increase in that year, had its sales of Bel-air frozen mince pies not substantially decreased due to its refusal to adopt a new carton, it would be unreasonable to infer that Pet's gain resulted from any sales loss by Utah Pie.

The total sales volume in dozens and the percentage of market share of Utah Pie and Pet in the Salt Lake City market, with the Bel-air sales to Pet excluded, in the years 1958 to 1961, inclusive, were as follows:

[fol. 1368]

| | *Volume of Sales* | | *Market Share* | |
|---|---|---|---|---|
| | *Pet* | *Utah Pie* | *Pet* | *Utah Pie* |
| 1958 | 8,336.5 | 37,969.5 | 16.4 | 66.5 |
| 1959 | 14,176.5 | 38,372 | 12.7 | 34.3 |
| 1960 | 28,786 | 83,894 | 15.6 | 45.5 |
| 1961 | 41,888.5 | 102,960 | 22.9 | 45.3 |

In 1962, Utah Pie's volume increased to 129,658.3. Pet's volume and its and Utah Pie's market share percentages are not shown in the record.

Even if Bel-air sales by Pet be included in its volume, Utah Pie greatly outdistanced Pet in 1960 and 1961.

On June 23, 1960, Schenk, general manager of the Frozen Foods Division of Pet, went to the Utah Pie plant in Salt Lake City, represented that he was a frozen food broker from the Northwest, and asked to be permitted to go through the plant. Permission was granted and later Schenk pre-

pared a report showing defects in Utah Pie's equipment and operations, to be used by D. T. Dittman of Pet in negotiating with Safeway for the latter's business in competition with Utah Pie. Of course, Pet's conduct was reprehensible and is not to be condoned. However, the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified and so did Young, Safeway's buyer. It thus appears that the Dittman report was never used by Pet in its competitive efforts with Utah Pie.

[fol. 1369] III

No. 7306

*Factual Statement in the Continental Appeals*

These appeals involve two claims—the §2(a) claim asserted by Utah Pie and the §2(a) counterclaim asserted by Continental.

Continental marketed its pies under the brand, Morton. It is an eight-inch, 22-ounce pie and is lighter and smaller than the pies of Utah Pie, all of which are eight-inch, 24-ounce pies.

The counterclaim was based upon the differences between the prices for which Utah Pie systematically sold frozen pies to retail chain stores and the substantially higher prices for which it sold them to other customers in the Salt Lake City market. Such differences resulted from the sales by Utah Pie under private and controlled labels to favored customers, which it began in 1960. Under those labels, Utah Pie sold its only size, grade, and quality of pie to the large favored buyers at substantially lower prices than other buyers were required to pay for Utah Pie's [fol. 1370] regular Utah brand. For example, in mid-1960 Utah Pie was selling its Utah brand frozen pie for $3.60 per dozen, while it was selling an identical pie under its Frost 'N' Flame brand exclusively to Associated Grocers at $3 per dozen. And on April 4, 1960, Utah Pie by letter

offered to sell Safeway, packed under its Bel-air label and delivered to its warehouse in Salt Lake City, frozen apple pies at $3 per dozen and frozen cherry and boysenberry pies at $3.30 per dozen. It was also selling at that time its Sonny Boy brand for $2.88 per dozen, f.o.b. Salt Lake City, for delivery to buyers in Spokane.

On the other hand, Utah Pie's claim against Continental was based upon price differences to noncompeting customers in unrelated geographical areas. It is a "primary line" case. It is mainly based upon two isolated two-week offers of its frozen pies, one made by Continental in June, 1961, and the other in July, 1961, to buyers in the Salt Lake City market at times when Continental was a marginal seller and Utah Pie was a dominant seller in the area.

[fol. 1371] It is apparent that Utah Pie's dramatic increase in sales volume in the years 1958 to 1962, inclusive, (see table, page 59, infra) in large part was due to the low prices at which it sold frozen pies to Associated Grocers, Utah Wholesale Grocery and Safeway. Associated Grocers was the largest buyer in the market, serving 150 to 175 retail stores out of its Salt Lake City headquarters. Beginning in 1960 and continuing thereafter, Utah Pie sold Associated Grocers pies under its controlled label, Frost 'N' Flame. That pie, identical with the pie marketed by Utah Pie under its Utah brand, was exclusive with Associated Grocers and was sold at a price 50 to 60 cents per dozen less than Utah Pie charged nonfavored competing purchasers for its Utah brand. Associated Grocers' tremendous competitive advantage, thus attained, caused it to support Frost 'N' Flame almost exclusively in its advertising. It also guaranteed Utah Pie's dominant position in the market by foreclosing the largest buyer from effective competition. Frost 'N' Flame quickly replaced Utah brand as the leading brand.

[fol. 1372] Utah Pie also produced pumpkin and mince pies for Safeway, the second largest buyer, under Safeway's private label, Bel-air, at prices substantially below those it charged for its identical pie sold under the Utah

label to nonfavored competing stores. Utah Pie also continually offered Safeway a preferentially low price on its frozen fruit pies packed under its Bel-air label. Safeway rejected those offers, not because of price, but for another reason fully set out in the Factual Statement in the Pet Appeal. In its first year of sales of Bel-air mince and pumpkin pies to Safeway, 1960, Utah Pie charged what Utah Pie later itself said was a "rock bottom" price, with the hope that it would induce Safeway to drop its then supplier, Pet Milk, in favor of Utah Pie.

In 1961, Utah Pie began selling its private label Mayfresh pies to Grand Central-American Stores, another of the four large buyers in the Salt Lake City market.

The adverse impact on Utah Pie's competitors was very substantial. From the time Utah Pie gave Associated Grocers its controlled label preference, Continental was [fol. 1373] unable to sell Associated Grocers a single pie. After Utah Pie began its controlled label sales to Grand Central Stores, Continental was unable to sell that company, and when the arrangement was extended early in 1962 to American Food Stores, which had been acquired by Grand Central, Continental lost the only chain that had been a more or less steady customer. Similarly, as to Safeway, Continental, up to June, 1961, was unable to make a single sale. In that month it made a sale to Safeway's food stores in Salt Lake City.

Continental enjoyed substantial sales in the Salt Lake City market in 1957, but from 1958 to 1960, inclusive, it was a negligible competitor in the Salt Lake City market. With the advent of Utah Pie as a competitor in 1958, Continental's volume in dozens fell to 754 and its market share to 1.3 per cent. In 1959, its volume of sales in dozens was 3,182 and its market share 2.9 per cent. In 1960, its volume of sales in dozens was 3,350 and its market share 1.8 per cent. In 1961, its sales increased and its total volume in dozens of sales in that year was 18,799.5 and its market [fol. 1374] share 8.3 per cent, but by the beginning of the fourth quarter of 1960, Continental had reduced the cost

of its pies laid down in Salt Lake City to a point where it could more nearly compete with Utah Pie's prices in the Salt Lake City market area.

Another basis of comparison is the number of times food retailers advertised Utah Pie's brands and Continental's Morton brand during the years 1957 to 1961, inclusive. This, because the undisputed evidence clearly established that retail newspaper advertising is necessary to frozen pie sales success. The following table shows the number of times retailers advertised the respective brands of Utah Pie and Continental in the five-year period.

| | 1957 | 1958 | 1959 | 1960 | 1961 |
|---|---|---|---|---|---|
| Utah Pie | 3 | 27 | 30 | 59 | 76 |
| Continental | 13 | 0 | 3 | 1 | 5 |

After the entry of Utah Pie into the Salt Lake City market in 1957, with its lower priced pies, Continental, because of its higher costs of production and transportation, was unable to keep its prices competitive with Utah [fol. 1375] Pie's prices. In 1960, with the advent of Utah Pie's controlled and private label prices, Continental ceased to maintain a sales representative in the market and was virtually out of the market. However, Continental continued in an effort to reduce its costs of production in order to become competitive. In 1960, it was successful in locating a "co-packing" operation in the heart of the California fruit growing region, which permitted fruit to be processed directly from the trees into the finished pie, without large intermediate packaging, storing, and shipping expenses. By such efforts, Continental was able to reduce its cost of apple pies laid down at Salt Lake City from approximately $3.75 per dozen in 1958 to approximately $2.80 per dozen in the second quarter of 1961. See chart annexed hereto as Appendix VI. It was also able to reduce its costs of other flavors laid down in Salt Lake City in comparable amounts. Having thus reduced its costs, Continental was again in a position to offer its Morton pies

directed to buyers in the Salt Lake market at prices which [fol. 1376] it hoped might prove to be competitive. In October, 1960, Continental contracted with a Salt Lake City food broker in an effort to resume distribution of its full line of Morton frozen food products in the Salt Lake City market. For seven months, from November, 1960, to June, 1961, the broker attempted to sell Continental frozen pies at prices generally competitive with Utah Pie's Utah brand.

During that period the broker called on the trade throughout the Salt Lake City market area, offering various short-term price concessions in the form of advertising allowances on pies, as well as other products in the Continental line. On the frozen pies, these price concessions ranged from $1.20 per dozen off the $4.50 list price on mince pies to 84 and 70 cents per dozen off the $4.00 list price on apple, cherry, and boysenberry pies, respectively. At these net prices, Continental was able to make only a total of seven sales to three small buyers in the outlying areas of Ogden, Boise, and Pocatello. It could make no sales to the major buyers, all located in Salt Lake City. The few sales it made did not adversely affect Utah Pie. [fol. 1377] During those seven months, Continental's best price offers, made on the price-per-ounce basis used by professional buyers in comparing prices, were competitive with prices offered by Utah Pie on its Utah brand. By June, 1961, it seemed apparent that if Continental was to recapture any portion of the market, it had to make better offers.

Continental was unable to sell to small buyers in the Salt Lake City area, because they lacked the refrigerated storage space necessary to buy direct from Continental. Continental could sell not less than a quarter of a truckload. Utah Pie, with its plant in Salt Lake City, was the only manufacturer who could feasibly sell directly to the small buyers. Of the larger buyers, Associated Grocers was handling Frost 'N' Flame brand at $3.10 per dozen,

the lowest price on the market; Grand Central was about to close a deal with Utah Pie for its own private label, Mayfresh, at the same prices charged Associated Grocers; and Safeway was buying its Bel-air frozen fruit pies exclusively from Pet Milk, from whom it could purchase three [fol. 1378] brands, including its own private label, in combined truckload shipments. Confronted with that situation, Continental's broker recommended that it meet the price being charged to Associated Grocers and offered to Grand Central, by offering apple pies at $2.85 per dozen on full truck quantities. This was approximately the ounce-for-ounce equivalent of Utah Pie's $3.10 price. Indeed, Continental's price was 1.08 cents per ounce and Utah Pie's price was 1.07 cents per ounce. In comparing Continental's prices with Utah Pie's prices, the fact that Continental's pies were 22 ounces in weight and Utah Pie's pies were 24 ounces in weight should be taken into consideration. Professional buyers evaluate competing offers on a price-per-ounce basis, although retail purchasers do not always give attention to the differences in the size of pies. Moreover, Continental's price was for full truck orders, only, while Utah Pie's price applied to orders of any size, down to a few dozen.

Continental approved the recommendation and a $2.85-$2.89 delivered price, depending on quantity ordered, was [fol. 1379] offered for a two-week period to those few buyers potentially able to buy from Continental. At the same time, Continental extended on a continuing basis for the Salt Lake City market area an offer of 30 cents per dozen freight allowance. At these prices, Continental made sales to American Food Stores in Ogden and to Associated Grocers in Pocatello, a small independent branch in Pocatello, both of which had previously purchased Morton pies, and at the time of the sale were not purchasing from Utah Pie.

In June, 1961, the merchandising manager for Safeway's food stores in Salt Lake City, purchased 6,250 dozen frozen

pies, their requirement for five weeks,[15] from Continental, and in July, 1961, Grocers Wholesale of Salt Lake City, a small wholesaler just starting in business, ordered 1,000 dozen frozen pies from Continental.

[fol. 1380] Utah Pie responded to Continental's offer, which lasted only two weeks and was once renewed a month later for the same period, by reducing its price on all of its 24-ounce apple pies, whatever the brand name, to $2.75 per dozen and offering all the customers unlimited quantities, to be delivered in lots of any size. When Continental learned of such offer by Utah Pie, and the merchandising manager for Safeway's food stores in Salt Lake City urged it to further reduce its price, it agreed with him to cancel an order he had already placed at the $2.85 price; and also offered to cancel another order placed by American Food Stores, rather than reduce its price to Utah Pie's offer, but American Food Stores did not elect to cancel its order. During the period 1958 to 1962, inclusive, in the Salt Lake City market, Continental reached its highest sales volume in June and July, 1961. Thereafter, its sales volume continuously decreased through 1962. Its 1962 sales volume was 8,685 dozen less than its 1961 volume. June and July, 1961, were also high sales volume months for Utah Pie, higher than any of the five preceding months and many [fol. 1381] other earlier months; and from July, 1961, on through 1962, its sales volume continued to increase. Its sales volume reached a new annual high in 1962, when it showed an increase of 26,968.3 dozen over 1961. Thus, Utah Pie effectively maintained its dominant position and discouraged further efforts by Continental to meet the low prices which Utah Pie continued to maintain throughout 1961 and 1962.

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[15] Young, the Safeway Frozen Food Department Manager, testified that he has no control over the brands of frozen fruit pies that Safeway Division Managers purchase for their stores; that they are "autonomous in their purchases"; and do not have to stock Bel-air pies; that he has to "sell them on Bel-air."

Continental was able in 1961 to increase its volume to 18,799.5 dozen and its market share percentage to 8.3, but in 1962 its volume dropped to 10,114.5 dozen, while Utah Pie's volume in that year was 129,658.3 dozen, an increase of 26,968.3 dozen over 1961. The record does not reflect facts from which market shares can be computed in 1962.

Invoices of sales of frozen pies by Continental in the Salt Lake City market during the period 1958 to January, 1962, inclusive, showed 142 items were sold at a profit and three items, one in 1958, one in 1961, and one in January, 1962, at a loss, before allocation of overhead costs. Its [fol. 1382] over-all sales showed a profit before deduction of overhead. After such allocation, an overall loss was reflected. Had Continental been able to develop a substantial volume of sales in such market, it no doubt would have been able to realize a profit after overhead was charged. But when it looked as though its efforts would become fruitful by the contract it secured with the Salt Lake City Safeway stores and Grocers Wholesale in 1961, Utah Pie reduced its price on its Utah and Frost 'N' Flame brands and the contract with Safeway was cancelled. Utah Pie maintained its reduced price for a long period thereafter.

Utah Pie also suffered a loss on its sales of frozen pies in 1958, notwithstanding it captured 66.5 per cent of the Salt Lake City market area in that year and sold a large volume of pies, and notwithstanding its low transportation and selling costs and its other competitive advantages. Its low price in 1958 could not, therefore, be justified by lower costs. By a large increase in its volume in 1959, 1960, and 1961, it was able to make substantial profits, just as it [fol. 1383] is fair to say Continental could have done, from 1961 on, had it succeeded in obtaining a substantial volume of sales.

The following table graphically shows a comparison of Utah Pie's and Continental's respective sales volume and market share percentage for the years 1958 to 1961, inclusive, and the sales volume for 1962[16] in the Salt Lake City market:

[16] Percentage of market for 1962 cannot be determined from record.

| | | Sales Volume in Dozens | % of Market |
|---|---|---|---|
| 1958 | (Utah Pie | 37,969.5 | 66.5 |
| | (Continental | 754 | 1.3 |
| 1959 | (Utah Pie | 38,372 | 34.3 |
| | (Continental | 3,182 | 2.9 |
| 1960 | (Utah Pie | 83,894 | 45.5 |
| | (Continental | 3,350 | 1.8 |
| 1961 | (Utah Pie | 102,690 | 45.3 |
| | (Continental | 18,799.5 | 8.3 |
| 1962 | (Utah Pie | 129,658.3 | |
| | (Continental | 10,114.5 | |

[fol. 1384]

IV

No. 7308

*Factual Statement in the Carnation Appeal*

The claim against Carnation was tried on the theory of low prices in the Salt Lake City market and high prices in the Los Angeles market, at which Carnation sold its frozen pies.

Carnation entered the frozen pie business in 1955, by acquiring a Los Angeles company then engaged in manufacturing and selling frozen pies in Utah and elsewhere under the Simple Simon label, or brand. Carnation made substantial improvements in its predecessor's plant at Torrance, California, (near Los Angeles) and radically altered its distribution system. At all times here material, Carnation marketed its Simple Simon pies in all western markets, that is, Los Angeles, San Francisco, Portland, Boise, Seattle, Spokane, Phoenix, Salt Lake City and Denver. Shortly after Carnation entered the field, the frozen pie business became highly competitive, marked by the introduction into the market of national brands, such as Pet's [fol. 1385] Pet-Ritz, Continental's Morton, and a number of other national brands. Also, in some of such national mar-

kets there were regional brands, such as Mary Elizabeth, County Fair, Frigid Dough, Chet's, and other, and also those of local manufacturers, such as Utah Pie, with their brands.

In order to meet the competitive activities of other manufacturers in the various markets in which it sold its pies, Carnation developed a program of special temporary price reductions, varying from market area to market area, and depending on local competitive conditions. These programs were called "deals" in the trade. In some areas they took the form of advertising allowances, identical with those described in the General Statement of Facts, supra. However, in Utah the allowances were not permitted to be considered in computing "cost" under the Utah "cost plus six per cent" minimum markup law (13-5-7 Utah Code Anno. 1953). Carnation accordingly adopted "off invoice" deals for Utah and other markets where similar statutes were in effect. Both types of deals had the same competitive purpose, namely, to induce the retailer to purchase and advertise Carnation pies and thereby meet the competitive tac- [fol. 1386] tics of other manufacturers having a like aim. All deals had two aspects in common. They were of a temporary nature and they were offered to all purchasers alike in each market.

Since deals were directed at local competitive conditions, they differed in duration, type and amount in each market area, so that Carnation's net prices in each of the national market areas also frequently differed. At times during the period 1958 to 1961, Carnation's prices in the Utah area were higher than those charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions.

In addition to Utah Pie's lower price structure, other competitive conditions in the period 1958 to 1961 affected the market price and the market for Simple Simon pies in the Salt Lake City market. In 1958, Safeway introduced

a private brand, Bel-air, manufactured by the Pet Milk Company. Though of a similar grade and quality, it was sold at a lower price than Simple Simon. In late 1959, Utah Pie introduced a controlled label, Frost 'N' Flame, [fol. 1387] for marketing through Associated Grocers, the largest group of cooperative buyers in that market. In 1961, it introduced another controlled label, Mayfresh, for marketing through Grand Central American in that market. The effect of a controlled label is to tie the purchaser to a single supplier. Such was the effect here on Associated Grocers and Grand Central American.

Frost 'N' Flame and Mayfresh pies were of similar quality with Simple Simon and other brands sold in Utah, but were introduced and sold at prices considerably below Carnation's prices for Simple Simon pies, as well as Utah Pie's own Utah brand. Utah Pie's Utah brand and its Frost 'N' Flame brand were concededly identical pies with different labels.

Utah Pie's sales to Associated Grocers increased from 18,621 cases in 1959 to 77,894 cases in 1960, and 102,834 cases in 1961, while sales in the entire Salt Lake City market area only doubled in size between 1959 and 1961.

The three largest buyers of frozen pies in the Utah market, whose advertising set the Utah market prices, were [fol. 1388] Associated Grocers, Safeway, and Utah Wholesale Grocery. In 1961, Utah Pie sold to Associated Grocers nearly nine times as many pies as did Carnation, while in 1958, Utah Pie sold Associated Grocers only three and one-half times as many pies as did Carnation. By the end of 1961, Carnation was entirely out at Safeway, the year in which Utah Pie sold Safeway 36,202 dozen frozen pies, including 6,533 dozen Bel-air mince and pumpkin pies and 11,568 dozen pies under Utah Pie's own brand. In 1958, Carnation sold four times as many pies as Utah Pie to Utah Wholesale Grocery, but in 1961, Utah Pie sold six and one-third times as many pies as did Carnation to Utah Wholesale Grocery. During the four-year period, Utah Pie's sales to the "big three" were over 240,000 dozen, while Carnation's were less than 30,000 dozen.

Utah Pie's books showed that for the fiscal year 1957, the last year in which it was engaged solely in the fresh pie business, it lost approximately $5,500. In its fiscal year 1958, when it seized 66.5 per cent of the frozen pie market through it price cutting activities, it had an operating loss [fol. 1389] of $1,264.51. During each of the fiscal years 1959, 1960, and 1961, it showed a substantial profit.

To make the comparison between Carnation and Utah Pie more graphic, we set forth in subjoined note 17, in parallel vertical columns, the percentage of the market share in the Salt Lake City market; and in like columns the volume of sales in dozens by Carnation and Utah Pie in each of the years 1958 to 1962, inclusive.

[fol. 1390] Carnation's total sales volume in the Salt Lake City market in 1957 was 9,286 dozen. But in 1958, in a rapidly expanding market, its volume was only 5,863 dozen. Moreover, its sales volume did not keep pace with the rapidly expanding Salt Lake City market in 1959, 1960 and 1961, and in 1962 its volume in that market fell to an all-time low of 5,329.5 dozen.

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17

*Market Share*

| | |
|---|---|
| 1958 Carnation—10.3% | Utah Pie—66.5% |
| 1959 Carnation— 8.6% | Utah Pie—34.3% |
| 1960 Carnation—12.1% | Utah Pie—45.5% |
| 1961 Carnation— 8.8% | Utah Pie—45.3% |

*Sales Volume*

| | |
|---|---|
| 1958 Carnation— 5,863 doz. | Utah Pie— 37,969.5 doz. |
| 1959 Carnation— 9,625 doz. | Utah Pie— 38,372 doz. |
| 1960 Carnation—22,371.5 doz. | Utah Pie— 83,894 doz. |
| 1961 Carnation—20,067 doz. | Utah Pie—102,690 doz. |
| 1962 Carnation— 5,329.5 doz.* | Utah Pie—129,658.5 doz.* |

(A lower level than any of the preceding five years.)

* Record does not reflect total sales volume for 1962, hence percentage market share cannot be computed.

(*continued on following page*)

Appendix VII, annexed hereto, is a chart which sets forth month by month in the first, second, third and fifth columns of figures the lowest absolute prices offered by Carnation for apple pie in the San Francisco, Spokane, Denver and Salt Lake City markets, and in the fourth column [fol. 1391] the lowest absolute price at which Utah Pie sold its Utah brand frozen apple pies in the Salt Lake City market. By "absolute price" is meant the list price, less any deals offered, whether direct discounts from invoices or allowances for advertising. This chart covers the period from January, 1958, to August, 1961.

An examination of such chart shows that Carnation's absolute price for apple pie[18] was uniform in the Spokane, Denver and Salt Lake City markets from January, 1958, through October, 1959; that during that period Carnation's price in the Salt Lake City market was always the same as or higher than its price in the fourth market area, San Francisco; and that during such time the only variations in Carnation's prices were in the San Francisco market, with such variations making the price in that market lower than its price in the other areas from time to time.

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Frozen apple pie is the volume leader and price indicator. The frozen apple pie sales in the Salt Lake City market from 1957 to 1961, inclusive, of Utah Pie and Carnation, and of Carnation in 1962, were as follows:

| | *1957* (4 mo.) | *1958* | *1959* | *1960* | *1961* | *1962* |
|---|---|---|---|---|---|---|
| Utah Pie | 893.5 | 10,312 | 13,285 | 27,225 | 46,791.5 | |
| | *1957* (12 mo.) | *1958* | *1959* | *1960* | *1961* | *1962* |
| Carnation | 3,234.5 | 2,391 | 3,164 | 8,455.5 | 6,885.5 | 1,802.5 |

Another basis of comparison is retailer's advertising. In 1961, retailers advertised Utah Pie's brands 72 times and Carnation's only four times.

[18] Again we use apple pie figures, because it is the most popular, lowest priced, and largest seller of the frozen pies.

The chart further shows that in February, 1960, Carnation's Utah price was lower than its San Francisco price, [fol. 1392] and in March, April, May, October, November and December, 1960, its Salt Lake City market price was lower than its Spokane market price, but that at no time during 1960 was the Salt Lake City market price the lowest price offered by Carnation in the several markets.

The chart further shows that from January, 1961, to July, 1961, Carnation's Salt Lake City market price was lower than its San Francisco and Spokane market prices, and that in August, 1961, its Salt Lake City market price was lower than its Spokane and Denver market prices, but in 1961 Carnation's Salt Lake City market price was never the lowest price offered by Carnation in the several markets.

The chart further shows that in only eight months of the 44 months here involved was Carnation's price for its Simple Simon pie lower than Utah Pie's price for its Utah brand pie in the Salt Lake City market, the months being October, November and December, 1958, July, 1959, February and March, 1960, and February and April, 1961.

Utah Pie's price for its Frost 'N' Flame pie from the time it was first introduced in August, 1959, through 1961, [fol. 1393] was always lower than Carnation's price for its Simple Simon pie, in the Salt Lake City market. In Appendix VIII, we set forth Utah Pie's sale prices for its Frost 'N' Flame apple pie and Carnation's offering prices for its Simple Simon apple pie from August, 1959, to August, 1961, inclusive, in the Salt Lake City market. It will be noted therefrom that the prices for the Simple Simon apple pie were always substantially higher than the prices for the Frost 'N' Flame apple pie during that period.

Appendices VII and VIII show that Carnation's prices for its Simple Simon pie from August, 1959, to August, 1961, inclusive, were always higher in the four markets covered in Appendix VII, of which the Salt Lake City market is one, than Utah Pie's prices for its Frost 'N' Flame pie in the Salt Lake City market, in that period, except in Denver in October, 1960, and January, February, March, April and

May, 1961. Frost 'N' Flame was sold exclusively to one customer in Salt Lake City.

Carnation's prices for other pies, through its deal offers in the Salt Lake City market, were at times below and at times above Utah Pie's price for its Utah brand. [fol. 1394] There was no proof of a price difference by Carnation in the Salt Lake City market and Los Angeles market, the original theory advanced by Utah Pie. Furthermore, the San Francisco market, where price differences did occur, was not an area of stable prices. From time to time advertising discounts from list price were granted and allowed by Carnation and others in the San Francisco market. Moreover, there were substantial differences in competitive conditions in the northern California and Salt Lake City markets, two wholly unrelated markets, throughout the period here involved. Utah Pie, from the beginning, resorted to price cutting to obtain the introduction of its pies and to hold business it had acquired. For example, on October 11, 1960, Utah Pie assured Safeway that the Bel-air price it had made to Safeway was lower than that offered to its regular trade, but was justified by savings Utah Pie would realize in the cost of manufacturing, sale and delivery, but when Utah Pie raised its price for mince and pumpkin pies to Safeway in 1961, it stated in a letter to Safeway that its 1960 price to Safeway was at "rock [fol. 1395] bottom" and was made to Safeway, because Utah Pie was anxious to introduce its product to Safeway and felt that the price it made in 1960 would get Safeway's business and "work into something for the future," evidently referring to Bel-air frozen fruit pies. In April, 1960, it offered to sell frozen fruit pies to Safeway at preferentially low prices. And in 1959 Utah Pie sold frozen mince and pumpkin pies to Busley's Super Market, a new customer in Denver, at $3.70 per dozen. Busley's purchasing agent testified it could sell such pies at 33 cents each, and that at such price "this item would have a terrific draw- a price lower than such pies had ever been sold in Denver, ing power." At that time the going price for such pies was 47 to 49 cents retail and $4.25 per dozen wholesale.

It should be noted that 1958, the year in which during the months of October, November and December Carnation's price for its Simple Simon pie was lower than Utah Pie's price for its Utah brand, was the year in which Utah Pie's market share of all the pies sold in the Salt Lake City market zoomed to 66.5 per cent. And further, that [fol. 1396] in 1959, when Utah Pie's market share fell to 34.3 per cent, Utah Pie's prices for its Utah brand, except in the month of July of that year, were always lower than Carnation's prices for its Simple Simon pie in the Salt Lake City market. And further, that in 1960, when Utah Pie's prices for its Utah brand were lower, except in two months, February and March, than Carnation's prices for its Simple Simon pie, and when Carnation's prices were always higher than Utah Pie's prices for its Frost 'N' Flame pie in the Salt Lake City market, Utah Pie's market share increased 11.2 per cent over the previous year and its volume more than doubled, being a 45,522 dozen increase over the previous year, while Carnation's market share increased only 3.5 per cent and its volume only 12,746.5 dozen. And finally, that in 1961, when Utah Pie's prices for its Utah brand were lower, except in two months, February and April, than Carnation's prices for its Simple Simon pie, and when Carnation's prices were always higher than Utah Pie's for its Frost 'N' Flame pie in the Salt Lake City market, Utah Pie's market share decreased two tenths [fol. 1397] of one per cent and its volume increased 18,796 dozen over the previous year, and Carnation's market share decreased 3.3 per cent and its volume decreased 2,304.5 dozen from the previous year.

The market shares, respectively, of Utah Pie, Carnation, and all other sellers in the Salt Lake City market area in the years 1958 to 1961, inclusive, were as follows:

| | *1958* | *1959* | *1960* | *1961* |
|---|---|---|---|---|
| Utah Pie | 66.5% | 34.3% | 45.5% | 45.3% |
| Carnation | 10.3% | 8.6% | 12.1% | 8.8% |
| All other sellers | 23.2% | 57.1% | 42.4% | 45.9% |

What Utah Pie lost in 1959 went not to Carnation, but to other sellers in that market area, as did Carnation's market share loss in that year.

The market share of both Carnation and Utah Pie increased in 1960, but it is clear that those gains resulted from loss of market share by sellers other than Utah Pie and Carnation. In 1961, Carnation's share dropped back to approximately where it was in 1959, Utah pie remained at approximately its 1960 percentage share, and other sellers gained slightly more than Carnation lost.

[fol. 1398] Carnation's reduction of prices in the Salt Lake City market was made in an effort that was far from successful to compete with the prices at which Utah Pie offered and sold its pies. Clearly, Carnation was never able to compete with Utah Pie's Frost 'N' Flame pie price, and only part of the time with the price at which Utah Pie priced and sold its Utah brand pies.

Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits on sales of frozen pies in other market areas.

Carnation's receipts from sales of frozen pies in the Salt Lake City market exceeded its direct costs, that is, manufacturing, spoilage and transportation costs. It probably also exceeded direct costs, if selling costs were included therein, but on the record before us we can only ascertain with certainty whether its receipts from sales exceeded direct costs, with selling costs included, as to apple pie sales. Carnation's offering prices for apple pie exceeded its direct costs, that is, manufacturing, spoilage, transportation and selling costs in each of the 44 months [fol. 1399] herein involved, except in February and March, 1960. In those months, its lowest offering price was $3.30 per dozen and its direct costs were $3.39 per dozen. Moreover, its average direct costs for the 44-month period were, manufacturing—$2.934, spoilage—$0.02, transportation—$0.35, and selling—$0.282, or $3.586 per dozen. Its average lowest offering price for apple pie in such period was $3.915 per dozen. Hence, its average lowest offering price exceeded such average direct costs by $0.329 per dozen.

Carnation made forecasts of losses in different markets from year to year, including the Salt Lake City market area, based on the experience of the previous year and future expectations, but there was no pattern of such forecasts. They varied from year to year and market to market.

[fol. 1400]

V

Applicable Legal Principles

That part of §2(a) here material is set forth below in note 19.

A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such party [fol. 1401] the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclu-

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[19] 15 U.S.C. §13(a) reads in part as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * * "

sions, the motion should be denied.[20] In reaching its determination "the court may not pass on the weight of the evidence or" decide "where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed."[21] In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence.

[fol. 1402] A violation of §2(a) embraces two essential elements: (1) A price difference as set forth therein; and (2) an effect resulting therefrom which "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such" price difference.[22]

The fact that a seller doing an interstate business lowers his price in one market area, without making a corresponding reduction in all other market areas in which he sells, is not in and of itself a violation of §2(a). That is especially true where the market areas involved are distinct, disconnected, unrelated, and heterogeneous, as are the areas involved in the instant case.[23]

[fol. 1403] It is true that "the statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect."[24]

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[20] Kippen v. Jewkes, 10 Cir., 258 F.2d 869, 873; Miller v. Brazel, 10 Cir., 300 F.2d 283, 286.

[21] Anderson v. Hudspeth Pine, Inc., 10 Cir., 299 F.2d 874, 876.

[22] F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536, 553; American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954; See also cases cited in note 26, pages 81, 82, infra.

[23] Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, 366-368, c.d. 350 U.S. 991; Anheuser-Busch, Inc. v. F.T.C., 7 Cir., 289 F.2d 835, 840.

[24] Corn Products Company v. Federal Trade Commission, 324 U.S. 726, 738; Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 46.

Chief Judge Murrah, speaking for this court in Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, 957, c.d. 363 U.S. 843, held the word "may" should be construed to mean "reasonable possibility," rather than the more positive phrase "reasonable probability." In support of his statement he cites Mr. Justice Black's opinion in Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, at page 46. Justice Black's statement that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have had such an effect" is based on the opinion of Chief Justice Stone in [fol. 1404] Corn Products Co. v. Federal Trade Commission, 324 U.S. 726, at page 742, but Justice Black's statement should be read in the light of another part of the Corn Products opinion, wherein the Chief Justice said, at page 738 of 324 U.S., "the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, (to substantially lessen competition) but to reach those which would probably have the defined effect on competition." (See note 14 to the opinion in the Morton Salt case, supra, 334 U.S. at page 46.)

"Reasonable possibility" means something more than "mere possibility." [25]

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[25] See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356-357.

In that case, the court in construing the word "may" in §3 of the Clayton Act, which makes it unlawful for any person to make a lease agreement, to sell or contract for sale of goods, or fix a price charged therefor, or a discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods of a competitor or competitors of the lessor or seller, "where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce," said:

"* * * But we do not think the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would

[fol. 1405] To establish a violation of §2(a) there must be, in addition to proof of price differences, evidence sufficient to support a finding that the lower price, in the market area in which it occurred, did substantially lessen competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with the person who granted such price difference, or the person who knowingly received the benefit thereof; or a finding that there is a reasonable possibility they will do so in the future.[26]

[fol. 1406] In American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954, the court said:

> "The adverse effect upon competition requisite to establish the Section 2(a) violation * * * is that the price discrimination creates a reasonable probability of substantial injury to competition * * *. Price

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under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

[26] Elgin Corporation v. Atlas Building Products Co., 10 Cir., 251 F.2d 7, 11, c.d. 357 U.S. 926; Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 65; Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, 367-368, c.d. 350 U. S. 991; A. E. Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453, 455; American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 104, c.d. 377 U.S. 954; See also, Mid-South Distributors v. F.T.C., 5 Cir., 287 F.2d 512, 517, c.d. 368 U.S. 838.

In Federal Trade Commission v. Simplicity Pattern Co., supra, the court said, in referring to the proof required to make a prima facie case under §§ 2(c), 2(d) and 2(e): *"Unlike § 2(a),* none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition." (Italics ours.)

Of course, the defendant has the burden of proving the affirmative defenses provided for in the Act.

Mid-South Distributors v. F.T.C., 5 Cir., 287 F.2d 512, 517 (note 9), c.d. 368 U.S. 838; Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746, 759-760; Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 44-45; United States v. Borden Co., 370 U.S. 460, 467; Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 514.

discrimination does not *per se* constitute a violation of Section 2(a). * * * The price discrimination, * * * must in the particular factual situation involved be capable of raising a reasonable probability of substantially lessening ability to compete. The protection [fol. 1407] intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental. * * *"

In Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, 954, c.d. 363 U.S. 843, the court said:

"* * * Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. * * *"[27]

Congress sought to protect and foster competition, not to eliminate it.[28]

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[27] See also, Anheuser-Busch, Inc. v. F.T.C., 7 Cir., 289 F.2d 835, 840; Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-249.

[28] Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-249; Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, 367-368, c.d. 350 U.S. 991.

In Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, at 248 the court said:

"The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' Staley Mfg. Co. v. Federal Trade Comm'n, 135 F.2d 453, 455. We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish

[fol. 1408] By the express wording of the statute, the effect on competition must be substantial. Trivial, remote, or inconsequential effect is not enough. "There must be something more than an essentially temporary minimal impact on competition." [29]

[fol. 1409] VI

The Decision and Directions for Judgment

The primary question presented by each of these appeals, except the one from the judgment against Continental on its counterclaim, is whether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future.

As we have heretofore stated, selling at lower prices in the Salt Lake City market than in other market areas in and of itself is not a violation of §2(a).

We do not think Congress intended that nation-wide sellers in different, separate, distinct, heterogeneous and unrelated markets, with different competitive conditions, must sell at the same price levels in each of such markets. [fol. 1410] However, we think it did intend that such a seller should not indulge in price differences that had a

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competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. * * *"

[29] American Oil Company v. F.T.C., 7 Cir., 325 F.2d 101, 106, c.d. 377 U.S. 954; The Borden Company v. F.T.C., 7 Cir., 339 F.2d 953, 957; Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 357; Whitaker Cable Corporation v. Federal Trade Com'n, 7 Cir., 239 F.2d 253, 256, c.d. 353 U.S. 938; Minneapolis-Honeywell Reg. Co. v. Federal Trade Com'n, 7 Cir., 191 F.2d 786, 790, certiorari granted, 342 U.S. 940, dismissed 344 U.S. 206.

reasonable possibility of substantially lessening competition or tending to create a monopoly, or to injure, destroy, or prevent competition with a person who grants or knowingly receives the benefit of such price differences. But it did not intend to proscribe a seller from fairly meeting competition.

We think the facts here speak for themselves. Utah Pie entered the frozen pie business shortly after the retail purchasers had become price conscious and when a lower retail price was an effective competitive force. It was not encumbered with a large advertising campaign and high manufacturing, transportation and selling costs. It was in a position immediately to take advantage of the situation by offering frozen pies at prices substantially lower than the current market prices in the Salt Lake City market. It was the first and arch price cutter in that market and it engaged in price cutting to obtain and retain frozen pie customers continuously, from the time it entered the business [fol. 1411] to the end of the period here involved. Lower prices were the principal means it employed to obtain and hold customers and it used such means very effectively. Through them it obtained the patronage of three of the largest retailers in that market. By the use of controlled labels, it effectively tied two of such major retailers to it as their sole supplier of frozen pies. It very substantially increased its sales volume from year to year, including 1962, and in each of the years 1958 to 1961, inclusive, had a very high percentage share of the total sales volume in the Salt Lake City market.

On the other hand, the defendants, early entrants into the frozen pie business, had depended on quality, ease and quickness of preparation, and large and expensive advertising campaigns to generate consumer appeal. Their manufacturing, transportation and selling costs were high. Their operations, in some respects, lacked efficiency. They could not change to lower prices to generate consumer appeal for their products, without making major changes and adjustments. They had to reduce costs by curtailing adver-

[fol. 1412] tising, improving their manufacturing and transportation practices, and promoting efficiency in their operations generally. All this took time and none of them, during the period here involved, reached a position where it could fully compete pricewise with Utah Pie.

We, of course, recognize that it was not necessary for Utah Pie, in order to make a case against a defendant, to prove that its actions had already lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with such defendant, and that it was sufficient for it to prove that it was reasonably possible that such actions would do so in the future. But if such action did not substantially lessen competition, or tend to create a monopoly, or injure, destroy, or prevent competition with any of the defendants during the almost four years here involved; and regard be given also to Utah Pie's substantial volume increase in 1962 and the sharp volume decrease in 1962 of two of the defendants[30] from their 1961 [fol. 1413] volume, it would seem to be quite unlikely that such a result would probably flow from such actions in the future.

We will now consider the §2(a) claims against each defendant separately.

## 1. Pet

In the factual statement in the Pet appeal, we set forth the history of Pet in the frozen pie field and the actions it took and the things it did to better enable it to meet the growing lower price competition.

Up to August, 1960, the only frozen pie Pet was selling in the Salt Lake City market was its Pet-Ritz. Due to the lower prices at which other brands were being sold in that market, its Pet-Ritz sales did not keep pace with the rapid growth of frozen pie sales therein. In that market, in 1958, its total Pet-Ritz sales were 16.4 per cent of the total sales of all frozen pies, and in 1959, 12.7 per cent. But from the

[30] Record does not show Pet's 1962 volume.

advent of Utah pie's controlled label, Frost 'N' Flame, in August, 1959, Pet's sales of its Pet-Ritz pies fell sharply and their total sale percentage in that market dropped to 4.5 per cent in 1960 and to 1.7 per cent in 1961.

[fol. 1414] Pet sold 25,462.5 dozen Bel-air frozen fruit pies to Safeway in 1959 in the Salt Lake City market, and in December of that year obtained a contract from Safeway to supply its requirement of Bel-air pies for its entire chain of food stores. Pet sold Bel-air frozen fruit pies in the Salt Lake City market in 1959, 1960 and 1961. Those sales afford no support for Utah Pie's §2(a) claims, because uncontradicted evidence clearly established (1) that the reduced price at which they were sold was fully justified by the reduced costs of manufacture, sale and delivery, and (2) that had Pet not sold such frozen fruit pies to Safeway, it would not have purchased them from Utah Pie, for reasons other than price, fully set forth in the Factual Statement in the Pet Appeal.

In August, 1960, Pet introduced its Swiss Miss eight-inch, 20-ounce frozen pie in the Salt Lake City market.

During the years 1958 to 1961, inclusive, the Pet-Ritz pies were sold by Pet in the Salt Lake City market at prices substantially higher than the prices at which Utah Pie sold its brands, all of which were of the same weight and [fol. 1415] quality as Pet-Ritz, in that market. And from August, 1960, through 1961, Swiss Miss Apple pies were sold by Pet at higher prices than the larger and heavier Frost 'N' Flame apple pies were sold by Utah Pie in the Salt Lake City market. During that period and in that market, Swiss Miss frozen fruit pies, other than apple pies, were sold at higher prices than Frost 'N' Flame frozen fruit pies, other than apple, were sold, if consideration be given to difference in weight.

During December, 1959, and the months subsequent thereto, when Pet was selling its Pet-Ritz pies at lower prices in the Salt Lake City market than in other market areas, the sales of Pet-Ritz pies in the Salt Lake City market had decreased to a point where they were competitively

insignificant in that market; and the sales volume of Pet-Ritz pies continued to decrease in that market in 1960 and 1961. Moreover, in the whole period December, 1959, through 1961, Utah Pie's prices for its Utah brand pie were always lower than Pet's prices for its Pet-Ritz pie in that market, although the two pies were of like size and quality.

[fol. 1416] During the 13-month period, August, 1960, to September, 1961, in only one month was the price for which Swiss Miss pie was sold in the San Francisco market higher than the price for which it was sold in the Salt Lake City market, and the price for which it was sold in that period in the latter market was never lower than the price for which it was sold in the Los Angeles market. And during all of those 13 months, Utah Pie sold its larger and heavier Frost 'N' Flame pie in the Salt Lake City market at prices substantially less than the prices for which Pet sold its Swiss Miss pies in that market.

At all times during the period 1958 to 1962, inclusive, Utah Pie was a vigorous and effective competitor and remained financially prosperous, sound, and strong.

We conclude that the evidence was wholly insufficient to support a finding that Pet, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Pet, by price differences or other acts, would do so in the future, or that [fol. 1417] Pet had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.[51]

[51] The instant case is clearly distinguishable from Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690. There, the claim was based on an alleged violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). No § 2(a) claim was asserted. There, the evidence was adequate to support a jury finding that respondents (defendants below) committed the alleged violations of the Sherman Act and that the specific acts charged to have been done by respondents were performed as a part of a basic plan to monopo-

[fol. 1418] We conclude the judgment against Pet should be reversed.

2. Continental

While Continental's sales of frozen pies in the Salt Lake City market were very substantial in 1957, its sales volume was so low in 1958, 1959 and 1960 that it was a negligible competitive factor in that market in those years.

The record is wholly barren of any proof that Continental in 1960 or in 1961, with the exception of one sale made in 1961, made any sales to a customer of Utah Pie, or that because of its sales Continental deprived Utah Pie of any frozen pie business it might otherwise have received.

[fol. 1419] All sales by Continental's broker in 1960, and up to June, 1961, were to comparatively small buyers and outside of Salt Lake City, and Utah Pie conceded they gave it no competitive difficulty.

In June, 1961, Continental did sell Safeway's local food stores in Salt Lake City 6,250 dozen pies, their requirement for about five weeks. Safeway was then a customer of Utah Pie and was buying from it Utah brand frozen fruit pies and Bel-air frozen pumpkin and mince pies. Utah Pie's sales to Safeway did decrease from 22,084.5 dozen in

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lize the vanadium market and that the plaintiff had suffered an injury and loss. The question was one of causation.

Here, the evidence wholly failed to establish one of the two essential elements of a § 2(a) violation charged against Pet, which Utah Pie was required to prove, namely, that the effect of the price differences had substantially lessened competition, or tended to create a monopoly, or to injure, destroy, or prevent competition with Pet, or that the price differences were likely to do so in the future. Utah Pie suffered no competitive injury.

Since evidentiary support of a § 2(a) violation was wholly lacking, an essential element for the application of the rule that where the plaintiff proves a loss and an anti-trust violation by the defendant of a nature likely to cause that type of loss, the jury may infer that a causal relation exists, was also lacking. (See Continental Ore Co. v. Union Carbide Corp., supra, p. 697.)

What we have here said as to Pet applies equally, as we will hereafter further show, to Continental and Carnation.

1960 to 18,101 dozen in 1961. However, that decrease of 3,983.5 dozen is more than accounted for by the fact that Safeway purchased 4,558.5 dozen less Bel-air mince pies from Utah Pie in 1961 than it did in 1960, because of Utah Pie's refusal to adopt a new carton requested by Safeway. Moreover, Continental's business relations with Safeway, resumed in June, 1961, were short-lived and after one sale [fol. 1420] and one order, later cancelled, they were terminated for a second time and not thereafter resumed.

While Continental attained its highest sales volume during the period 1958 to 1962, inclusive, in the Salt Lake City market in June and July, 1961, its sales volume thereafter continuously declined through 1962. On the other hand, Utah Pie's sales volume in June and July, 1961, was also high, higher than any of the preceding five months and many other earlier months, and from July, 1961, on, Utah Pie's sales volume substantially increased and reached an all-time annual high in 1962. Thus, it will be seen that the effect of Continental's sales in the Salt Lake City market in June and July, 1961, was at most minimal and clearly did not substantially lessen competition in the Salt Lake City market, nor injure or weaken Utah Pie as a competitor of Continental.

We conclude that the evidence was wholly insufficient to support a finding that Continental, by price differences or other acts, had substantially lessened competition, or [fol. 1421] tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Continental, by price differences or other acts, would do so in the future, or that Continental had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.

With respect to Utah Pie's belated contention that the verdict against Continental can be supported by evidence of price discrimination violations in the Denver market area, little need be said. It is a departure from the theory on which Utah Pie, by its requested instructions, asked

the court to submit its claim to the jury. It is a theory clearly not submitted to the jury by the court in its charge, [fol. 1422] nor passed on by the jury. The Denver market area was never mentioned and the Salt Lake City market was frequently referred to in the charge. The verdict returned was in a form submitted to the court by Utah Pie, and by its express language showed it was based solely on a price discrimination in the Salt Lake City market. For the reasons stated, such contention is clearly untenable.[22]

For these reasons, the judgment against Continental on Utah Pie's claim should be reversed.

### 3. Carnation

Carnation was confronted with powerful competitive factors in the Salt Lake City market. Utah Pie's Frost 'N' Flame pie, introduced in late 1959 and sold exclusively through Associated Grocers, and the Mayfair pie, intro- [fol. 1423] duced by Utah Pie in 1961 and sold exclusively through Grand Central American, were similar in quality, size and weight with Carnation's Simple Simon, but were introduced and continuously sold at prices substantially below Carnation's price for its Simple Simon pie. In only eight months of the 44 months here involved was Carnation's price for its Simple Simon pie lower than Utah Pie's price for its Utah brand pie, the months being October, November and December, 1958, July, 1959, February and March, 1960, and February and April, 1961.

In 1959, Safeway introduced its private brand, Bel-air. Utah Pie sold Bel-air mince and pumpkin pies to Safeway at prices below Carnation's price for its Simple Simon pies.

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[22] Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801, 808; Prairie Band of Pottawatomie Tribe of Indians v. Pukkee, 10 Cir., 321 F.2d 767, 770-771; Trafford v. Yellow Cab Co., 3 Cir., 293 F.2d 43; National Equipment Rental Ltd. v. Stanley, 2 Cir., 283 F.2d 600, 603; Gilby v. Travelers Insurance Co., 8 Cir., 248 F.2d 794, 797; In Re Linda Coal & Supply Co., 3 Cir., 255 F.2d 653, 656-657.

The controlled labels effectively tied Associated Grocers and Grand Central American to Utah Pie as their supplier. Utah Pie's sales to Associated Grocers increased from 9,310.5 dozen in 1959 to 38,947 dozen in 1960 and 51,417 dozen in 1961. In 1961, Utah Pie sold Associated Grocers nearly nine times as many pies as did Carnation, while in [fol. 1424] 1958 Utah Pie sold Associated Grocers only three and one-half times as many pies as did Carnation. In 1958, Carnation sold four times as many pies to Utah Wholesale Grocery as did Utah Pie, but in 1961 the situation was strikingly reversed when Utah Pie sold six and one-third times as many pies to Utah Wholesale Grocery as did Carnation.

By the end of 1961, Safeway, which had theretofore been a customer of Carnation, completely ceased buying pies from Carnation. During the four-year period, Utah Pie's sales to the big three were over 240,000 dozen, while Carnation's were less than 30,000 dozen.

In 1958, the year in which, during three months, the prices of the Simple Simon pie were lower than the prices of the Utah brand pie, Utah Pie's market share of all pies sold in the Salt Lake City market zoomed to 66.5 per cent.

In 1960, when the prices of the Utah brand pies were always lower than the prices of Simple Simon pies, except in two months, and when the prices of Simple Simon pies were always higher than the prices of Frost 'N' Flame pies, Utah Pie's market share percentage increased 11.2 per cent over 1959, and its volume increased 45,522 dozen and [fol. 1425] was more than double its 1959 volume. But Carnation's market share percentage increased only 3.5 per cent and its volume only 12,746.5 dozen over its 1959 market share and volume.

In 1961, when the prices of Utah brand pies were always lower than the prices of Simple Simon pies, except in two months, and when the prices of Simple Simon pies were always higher than the prices of Frost 'N' Flame pies, Utah Pie's market percentage decreased two-tenths of one per cent and its volume increased 18,796 dozen over the previous year, and Carnation's market share percentage

decreased 3.3 per cent and its volume decreased 2,304.5 dozen from the previous year.

In 1959, a year when the prices of Simple Simon pies were always higher, except in one month, than the prices of Utah brand pies, Utah Pie's market share percentage fell to 34.3 per cent, the lowest for the period involved, but its volume increased over the previous year, as did Carnation's, but Carnation's market share percentage decreased from 10.3 to 8.6 per cent, also its lowest for the period in-
[fol. 1426] volved. And in that year Utah Pie sold approximately four times as many frozen pies as did Carnation.

Finally, in 1962, Utah Pie's sales volume of frozen pies reached an all-time high of 129,658.3 dozen, while Carnation's volume fell to an all-time low of 5,329.5 dozen.

The foregoing facts and others set forth in the Factual Statement in the Carnation Appeal clearly demonstrate that Carnation's sales and prices in the period 1958 to 1962, inclusive, did not substantially lessen competition in the Salt Lake City market, nor injure or weaken Utah Pie's ability as a competitor of Carnation in the Salt Lake City market. Moreover, a contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition.

[fol. 1427] The evidence clearly shows that throughout the period 1958 to 1962, inclusive, Utah Pie was a vigorous, active, healthy and effective competitor in the Salt Lake City market and refutes a finding that Carnation, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Carnation, by price differences or other acts, would do so in the future, or that Carnation had taken or would

take in the future any appreciable amount of frozen pie business from Utah Pie.

We conclude the judgment against Carnation should be reversed.

[fol. 1428] 4. Continental's Counterclaim

The record shows that counsel for Utah Pie intentionally and purposefully refrained from moving at any time for a directed verdict in its favor on the counterclaim.

In his argument to the jury, counsel for Continental limited his claim for a money recovery to nominal damages.

The court submitted to the jury the §2(a) claim and two other claims no longer material and advised the jury that since Continental had limited its claim for a money recovery to nominal damages, if it found for Continental it "need not calculate the full amount" of damages and should award only one dollar.

The jury returned a verdict in which it found that "Utah Pie * * * has discriminated in the prices which it has charged to competing customers for frozen pies in the Utah-Idaho trading area in violation of Section 2 * * * and thereby proximately caused Continental * * * damage," for which it was awarded one dollar.

[fol. 1429] Thereupon, counsel for Continental moved for judgment on its counterclaim, including an award for attorneys' fees and costs. The court granted the motion. Thereafter, Utah Pie moved for judgment n.o.v., on the ground that the evidence was insufficient to support the finding that Utah Pie violated §2(a), and on the ground that Continental failed to prove it suffered an impact or injury from such a violation. The court granted that motion and entered judgment for Utah Pie.

The Seventh Amendment to the Constitution of the United States provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 50(b) of the Federal Rules of Civil Procedure in part provides:

"(*b*) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the [fol. 1430] verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * * ."

In Slocum v. New York Life Ins. Co., 228 U.S. 364, "the Court decided that a state statute, providing for a judgment n.o.v. where a verdict should have been directed for insufficiency of evidence, could not, in the light of the Seventh Amendment, be followed in the federal courts pursuant to the Conformity Act." Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

Thereafter, however, in Northern Ry. Co. v. Page, 274 U.S. 65, where the federal district court followed the Massachusetts practice of entering judgment on the basis of one of two alternative verdicts requested of the jury because of the court's indecision as to whether a directed verdict was proper, the Court held so to do was not a "'reexamination' within the intendment of the Seventh Amendment." Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

Then in Baltimore & Carolina Line v. Redman, 295 U.S. 654, the Supreme Court held a federal district court could enter a judgment n.o.v. where, in accordance with state [fol. 1431] practice, the district judge had expressly reserved decision on a motion to dismiss or on a motion for a directed verdict. It distinguished the Slocum case, in that there a directed verdict was denied without any reservation of the question of the sufficiency of the evidence and the jury's verdict was taken unconditionally, while in the Redman case the court expressly reserved its ruling on the motions, based on an asserted insufficiency of the evidence

to support a verdict for the plaintiff, a question of law to be resolved by the court, and the verdict for the plaintiff was taken pending the court's ruling on the motions and subject to those rulings. Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07.

The only changes made in the common law practice by Rule 50(b) were to make the reservation of the trial court's decision automatic and limit the time within which the motion for judgment n.o.v. may be made. Moore's Federal Practice, 2nd Ed., Vol. 5, §50.07. It has application only if a motion is made upon which decision can be reserved. It is the reservation of decision, not the making of the motion, [fol. 1432] which is automatic. Absent a motion for a directed verdict or other like motion, no reservation of decision can be made, the verdict of the jury is returned unconditionally, and it may not be set aside on a motion n.o.v. or reviewed on appeal.[33]

Counsel for Utah Pie assert the instant case is distinguishable and not within the Rule, for the asserted reason that proof of impact, injury, and damage are jurisdictional. Of course, impact and injury to the plaintiff to his damage are essential elements of a claim for a violation of §2(a) and must be proven, but that is true with respect to the essential elements of any claim asserted in a civil ac- [fol. 1433] tion. We do not concede that such elements of Continental's claim were not proven here, but even if they were not, the question of the sufficiency of the evidence to establish them had to be properly raised, by motion for a directed verdict or other like motion, before the case went to the jury and its unconditional verdict was returned. Not having been so raised and an unconditional verdict having

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[33] Moore's Federal Practice, 2nd Ed., Vol. 5, §50.08; Mutual Ben. Health & Accident Ass'n. v. Thomas, 8 Cir., 123 F.2d 353, 355; Aetna Casualty and Surety Co. v. Yeatts, 4 Cir., 122 F.2d 350, 352; Dickerson v. Franklin Nat. Ins. Co. of New York, N.Y., 4 Cir., 130 F.2d 35, 37; Fleming v. Lawson, 10 Cir., 240 F.2d 119, 120-121; Roberts v. Sawyer, 10 Cir., 252 F.2d 286; Brown v. Poland, 10 Cir., 325 F.2d 984, 985-986.

been so returned, the court could not reexamine the facts found by the jury and pass on the sufficiency of the evidence to support the verdict on a motion for judgment n.o.v.

Utah Pie's conspiracy claim and §2(a) claims and Continental's counterclaims were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the [fol. 1434] claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation. Therefore, we think the ends of justice will be best served by a new trial of the issues raised on the counterclaim, where the only evidence adduced will be that pertinent to such issues. Accordingly, the judgment n.o.v. in favor of Utah Pie on the counterclaim is reversed and the cause remanded, with instructions to grant Utah Pie a new trial on the counterclaim. 28 U.S.C.A. §2106. In so doing, we must not be understood as implying that we think the evidence adduced at the trial was not sufficient to take the case to the jury on the counterclaim issues.

[fol. 1435] The judgment in favor of Utah Pie on its §2(a) claims is reversed and the cause remanded, with instructions to enter judgment for the defendants.

## APPENDIX I

(See opposite) ☞

[fol. 1436]

## APPENDIX I

### YEARLY SALES OF APPLE PIE BY UTAH PIE COMPANY BY MARKET AREAS AND BRANDS

(Figures in Dozens)

| Market Area | No. Customers | Brand | 1958 | 1959 | 1960 | 1961 |
|---|---|---|---|---|---|---|
| Utah & Idaho | 34 | Utah Brand | 11,169.5 | 14,885.5 | 14,707.5 | 20,390.5 |
| | | Frost 'N' Flame | 0 | 220 | 13,328.5 | 27,193 |
| | | Mayfresh | 0 | 0 | 0 | 520.5 |
| Total | | | 11,169.5 | 15,105.5 | 28,036 | 48,104 |
| % total sales in all markets | | | 98.7 | 97.18 | 83.15 | 90.6 |
| Oregon | 1 | Utah Brand | 0 | 0 | 0 | 969.5 |
| Total | | | 0 | 0 | 0 | 969.5 |
| % total sales in all markets | | | 0 | 0 | 0 | 1.8 |
| Spokane | 1 | Utah Brand | 0 | 0 | 753.5 | 450 |
| | | Frost 'N' Flame | 0 | 0 | 529.5 | 500 |
| | | Sonny Boy | 0 | 0 | 4,159 | 3,203.5 |
| Total | | | 0 | 0 | 5,442 | 4,153.5 |
| % total sales in all markets | | | 0 | 0 | 16.1 | 7.53 |
| Colorado | 5 | Utah Brand | 0 | 401 | 16 | 23 |
| Total | | | 0 | 401 | 16 | 23 |
| % total sales in all markets | | | 0 | 2.6 | .05 | .04 |

[fol. 1437]

APPENDIX I - continued

| Market Area | No. Customers | Brand | 1958 | 1959 | 1960 | 1961 |
|---|---|---|---|---|---|---|
| Wyo. | 5 | Utah Brand | 39.5 | 30.5 | 32 | 18 |
| Total | | | 39.5 | 30.5 | 32 | 18 |
| % total sales in all markets | | | .35 | .19 | .1 | .03 |
| Cal. & Nevada | 7 (Cal. 1) (Nev. 6) | Utah Brand | 118 | 0 | 166.5 | 0 |
| | | Frost 'N' Flame | 0 | 5 | 50 | 0 |
| Total | | | 118 | 5 | 216.5 | 0 |
| % total sales in all markets | | | 1.04 | .03 | .6 | 0 |
| Total, all markets | 53 | | 11,327 | 15,542 | 33,742.5 | 55,116.5 |

[fol. 1438]

# APPENDIX II

APPENDIX II

## LOWEST PET-RITZ OFFERING PRICES IN NINE MARKET AREAS

(Prices are in Dozens)

This appendix sets forth Pet's lowest offering prices for its Pet-Ritz frozen apple pie in each month here involved in each state, except in California, which is divided into Northern California and Southern California, with certain symbols, the meanings of which are set forth below.

### Symbols

H = Pet's price higher than Utah Pie's in Utah.

L = Pet's Utah price lower than in other areas.

____ = Lowest Pet price in all of areas shown.

| Date | Wyo. | Wash. | Utah | Ore. | Mont. | Idaho | Colo. | No. Cal. | So. Cal. |
|---|---|---|---|---|---|---|---|---|---|
| 1958 | | | | | | | | | |
| Jan. | 4.76 | 4.76 | H4.76 | 4.76 | 4.76 | 4.76 | 4.76 | 4.70 | 4.30 |
| Feb. | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.70 | 4.70 |
| Mar. | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.70 | 4.46 |
| Apr. | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.70 | 4.36 |
| May | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.48 | 4.38 |
| June | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.48 | 4.38 |
| July | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.44 | 4.34 |
| Aug. | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.32 | 4.22 |
| Sept. | 4.92 | 4.92 | H4.92 | 4.92 | 4.92 | 4.92 | 4.92 | 4.32 | 4.22 |
| Oct. | 4.92 | 4.00 | H4.92 | 4.00 | 4.92 | 4.92 | 4.92 | 4.00 | 4.22 |
| Nov. | 4.92 | 4.00 | H4.92 | 4.00 | 4.92 | 4.92 | 4.92 | 4.00 | 4.58 |
| Dec. | 4.92 | 4.00 | H4.92 | 4.00 | 4.92 | 4.92 | 4.92 | 4.00 | 4.58 |

[fol. 1439]

APPENDIX II - continued

| Date | Wyo. | Wash. | Utah | Ore. | Mont. | Idaho | Colo. | No. Cal. | So. Cal. |
|---|---|---|---|---|---|---|---|---|---|
| 1959 | | | | | | | | | |
| Jan. | 4.32 | 4.32 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| Feb. | 4.32 | 4.32 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| Mar. | 4.32 | 4.32 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| Apr. | 4.32 | 3.82 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| May | 4.32 | 3.82 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| June | 4.32 | 4.32 | X4.32 | 4.32 | 4.32 | 4.32 | 4.32 | 4.00 | 3.90 |
| July | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.90 |
| Aug. | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.90 |
| Sept. | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.90 |
| Oct. | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.90 |
| Nov. | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.60 |
| Dec. | 4.00 | 4.00 | X3.80L | 4.00 | 4.00 | 3.80 | 4.00 | 3.70 | 3.60 |
| 1960 | | | | | | | | | |
| Jan. | 4.00 | 2.80 | X4.00 | 3.40 | 4.00 | 4.00 | 4.00 | 3.70 | 3.60 |
| Feb. | 4.00 | 2.80 | X3.70L | 3.40 | 4.00 | 3.40 | 4.00 | 3.70 | 3.60 |
| Mar. | 4.00 | 4.00 | X3.70L | 4.00 | 4.00 | 3.40 | 4.00 | 3.70 | 3.60 |
| Apr. | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.70 | 3.60 |
| May | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.70 | 3.60 |
| June | 4.00 | 4.00 | X4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 4.00 | 3.60 |
| July | 4.00 | 3.88 | X4.00L | 4.36 | 4.00 | 4.00 | 4.00 | 3.52 | 3.66 |
| Aug. | 4.00 | 4.36 | X4.00L | 4.06 | 4.00 | 4.00 | 4.00 | 3.86 | 3.46 |
| Sept. | 4.00 | 3.86 | X4.36 | 3.86 | 4.00 | 3.86 | 4.00 | 3.86 | 3.46 |
| Oct. | 4.00 | 3.86 | X4.36 | 3.86 | 4.36 | 3.86 | 4.00 | 3.36 | 3.90 |
| Nov. | 4.00 | 4.36 | X4.36 | 4.36 | 4.36 | 4.36 | 4.00 | 3.36 | 3.90 |
| Dec. | 4.00 | 3.76 | X4.36 | 4.36 | 4.36 | 4.36 | 4.00 | 4.36 | 3.90 |
| 1961 | | | | | | | | | |
| Jan. | 4.00 | 3.76 | X3.70L | 4.06 | 3.70 | 4.00 | 3.70 | 4.00 | 3.90 |
| Feb. | 3.80 | 3.76 | X3.70L | 4.06 | 3.70 | 4.00 | 3.70 | 4.06 | 3.90 |
| Mar. | 3.56 | 3.76 | X3.56L | 4.06 | 3.56 | 3.56 | 4.00 | 3.96 | 3.86 |
| Apr. | 3.64 | 3.76 | X3.56L | 3.76 | 3.56 | 3.56 | 3.64 | 3.86 | 3.56 |
| May | 3.80 | 3.76 | X4.36 | 4.36 | 4.36 | 4.36 | 3.64 | 3.86 | 3.56 |
| June | 3.80 | 3.76 | X4.36 | 4.36 | 4.36 | 4.36 | 4.00 | 3.86 | 3.56 |
| July | 4.00 | 3.86 | X4.36 | 4.36 | 4.36 | 4.36 | 4.00 | 3.86 | 3.46 |
| Aug. | 4.00 | 3.86 | X4.36 | 4.36 | 4.36 | 4.36 | 4.00 | 3.76 | 3.11 |

[fol. 1440]

# APPENDIX III

## APPENDIX III

### LOWEST APPLE PIE SALE PRICES FOR UTAH BRAND AND FROST 'N' FLAME BRAND IN THE SALT LAKE CITY MARKET

(Prices are in Dozens)

| Date | Utah Brand | Frost 'N' Flame |
|---|---|---|
| 1958 | | |
| Jan. | 4.15 | ----* |
| Feb. | 4.30 | ---- |
| Mar. | 4.30 | ---- |
| Apr. | 4.00 | ---- |
| May | 4.00 | ---- |
| June | 4.00 | ---- |
| July | 4.00 | ---- |
| Aug. | 4.00 | ---- |
| Sept. | 4.00 | ---- |
| Oct. | 4.00 | ---- |
| Nov. | 4.00 | ---- |
| Dec. | 4.00 | ---- |
| 1959 | | |
| Jan. | 4.00 | ---- |
| Feb. | 4.00 | ---- |
| Mar. | 4.00 | ---- |
| Apr. | 4.00 | ---- |
| May | 4.00 | ---- |
| June | 4.00 | ---- |
| July | 4.00 | ---- |
| Aug. | 3.60 | 3.70 |
| Sept. | 3.60 | 3.70 |
| Oct. | 3.50 | 3.70 |
| Nov. | 3.50 | ---- |
| Dec. | 3.60 | ---- |

* ---- indicates no sales in that month.

## APPENDIX VII

LOWEST APPLE PIE OFFERING PRICES OF CARNATION BY MARKET AREAS, COMPARED TO UTAH PIE COMPANY'S LOWEST APPLE PIE PRICE IN SALT LAKE CITY MARKET FOR ITS UTAH BRAND PIE

(Prices are in Dozens)

Symbols

Name of City = Frozen pie market area within and surrounding such city.

X = Carnation Salt Lake City price higher than Utah Pie price.

L = Carnation Salt Lake City price lower than other market areas.

____ = Lowest Carnation price in all market areas.

| Date | Carnation | | | Utah Pie Salt Lake City. | Carnation Salt Lake City |
|---|---|---|---|---|---|
| | San Francisco | Spokane | Denver | | |
| 1958 | | | | | |
| Jan. | 4.82 | 4.82 | 4.82 | 4.15 | X4.82 |
| Feb. | 4.82 | 4.82 | 4.82 | 4.30 | X4.82 |
| Mar. | 4.82 | 4.82 | 4.82 | 4.30 | X4.82 |
| Apr. | 4.58 | 4.82 | 4.82 | 4.00 | X4.82 |
| May | 4.38 | 4.82 | 4.82 | 4.00 | X4.82 |
| June | 4.38 | 4.82 | 4.82 | 4.00 | X4.82 |
| July | 4.34 | 4.82 | 4.82 | 4.00 | X4.82 |
| Aug. | 4.22 | 4.82 | 4.82 | 4.00 | X4.82 |
| Sept. | 4.22 | 4.82 | 4.82 | 4.00 | X4.82 |
| Oct. | 3.90 | 3.90 | 3.90 | 4.00 | 3.90 |
| Nov. | 3.78 | 3.90 | 3.90 | 4.00 | 3.90 |
| Dec. | 3.78 | 3.90 | 3.90 | 4.00 | 3.90 |

[fol. 1442]

## APPENDIX IV

APPENDIX IV

LOWEST PET-RITZ APPLE PIE
SALE PRICES IN SEVEN MARKETS

(Prices are in Dozens)

| Date | Salt Lake City | San Francisco | Seattle | Portland | Los Angeles | Denver | Spokane |
|---|---|---|---|---|---|---|---|
| 1958 | | | | | | | |
| May | 5.16 | 4.72 | 4.96 | 5.00 | 4.58 | 4.96 | 5.16 |
| June | 5.00 | 4.68 | 5.00 | 5.00 | 4.58 | 4.92 | 5.16 |
| July | 5.00 | 4.68 | 5.00 | 5.00 | 4.58 | 4.96 | 5.16 |
| Aug. | 5.00 | 4.68 | 4.96 | 5.00 | 4.58 | 4.96 | 5.16 |
| Sept. | 5.00 | 4.68 | 5.00 | 5.00 | 4.58 | 4.96 | 5.16 |
| Oct. | 5.00 | 4.68 | 4.96 | 5.00 | 4.58 | 4.96 | 5.00 |
| Nov. | 5.00 | 4.56 | 4.80 | 4.84 | 4.58 | 4.96 | 4.84 |
| Dec. | 5.00 | 4.56 | 4.84 | 4.80 | 4.58 | 4.04 | 4.84 |
| 1959 | | | | | | | |
| Jan. | 4.44 | 4.04 | 4.36 | 4.44 | 3.90 | 4.36 | 4.44 |
| Feb. | 4.36 | 3.36 | 4.36 | 4.44 | 3.90 | 4.36 | 4.44 |
| Mar. | 4.44 | 4.00 | 4.36 | 4.44 | 3.90 | 4.36 | 4.36 |
| Apr. | 4.44 | 4.00 | 4.36 | 4.44 | 3.90 | 4.32 | 4.44 |
| May | 4.44 | 4.00 | 3.82 | 4.44 | 3.90 | 4.32 | 4.44 |
| June | 4.44 | 4.00 | 4.44 | 4.44 | 3.90 | 4.32 | 4.44 |
| July | 4.12 | 4.00 | ----* | 4.64 | 3.94 | 4.00 | 4.04 |
| Aug. | 4.12 | 4.00 | ---- | 4.48 | 3.90 | 4.00 | 4.04 |
| Sept. | 4.12 | 4.00 | ---- | 4.48 | 3.90 | 4.00 | 4.04 |
| Oct. | 4.04 | 4.04 | ---- | 4.48 | 3.90 | 4.00 | 4.04 |
| Nov. | 4.12 | 4.00 | ---- | ---- | 3.90 | 4.00 | 4.04 |
| Dec. | 3.84 | 4.00 | ---- | ---- | 3.90 | 4.00 | 4.04 |
| 1960 | | | | | | | |
| Jan. | 4.12 | 4.00 | 4.12 | ---- | 3.90 | 4.00 | 4.12 |
| Feb. | 4.12 | 4.00 | 4.00 | ---- | 3.90 | 4.00 | 4.00 |
| Mar. | 4.04 | 4.00 | ---- | ---- | 3.90 | 4.00 | 4.04 |
| Apr. | 4.04 | 4.00 | 4.04 | ---- | 3.90 | 4.00 | 4.12 |
| May | 4.12 | 4.00 | 4.12 | ---- | 3.90 | 4.00 | 4.12 |
| June | ---- | 4.00 | 4.04 | 4.28 | 3.90 | 4.00 | 4.12 |
| July | 4.28 | 4.00 | 4.04 | 4.04 | 3.90 | 4.00 | 4.04 |
| Aug. | 4.28 | 4.40 | 4.48 | 4.40 | 4.26 | 4.00 | 4.48 |
| Sept. | 4.28 | 4.40 | 4.36 | 4.36 | 4.26 | 4.00 | 4.48 |
| Oct. | 4.64 | 4.36 | 4.36 | 4.40 | 4.26 | 4.00 | 4.48 |
| Nov. | 4.64 | 4.36 | 4.40 | 4.40 | 4.26 | 4.00 | 4.48 |
| Dec. | 4.64 | 4.40 | 4.00 | 4.48 | 4.26 | 4.00 | 4.08 |

* ---- indicates no sales in that month.

[fol. 1443]

APPENDIX IV - continued

| Date | Salt Lake City | San Francisco | Seattle | Portland | Los Angeles | Denver | Spokane |
|---|---|---|---|---|---|---|---|
| 1961 | — | | | | | | |
| Jan. | 4.28 | 4.40 | 4.40 | 4.48 | 4.25 | 4.00 | 4.40 |
| Feb. | 4.28 | 4.40 | 4.36 | 4.40 | 4.26 | 4.00 | 4.40 |
| Mar. | 4.24 | 4.40 | 4.35 | 4.40 | 4.26 | 4.00 | 4.40 |
| Apr. | 4.08 | 4.48 | 4.35 | 4.40 | 4.26 | 4.00 | 4.40 |
| May | 4.43 | 4.40 | 4.40 | 4.48 | 4.26 | 3.84 | 4.40 |
| June | 4.54 | 4.48 | 4.40 | 4.40 | 4.26 | 3.84 | 4.40 |
| July | 4.54 | 4.48 | 4.48 | 4.40 | 4.26 | 4.00 | 4.40 |
| Aug. | 4.64 | 4.48 | 4.40 | 4.40 | 4.26 | 4.00 | 4.40 |
| Sept. | 4.64 | 4.40 | 3.80 | 4.40 | 4.25 | 4.00 | 3.80 |
| Oct. | 4.54 | 4.40 | 3.80 | 4.48 | 4.25 | 4.00 | 3.80 |
| Nov. | 4.64 | 4.48 | 3.90 | 4.40 | 4.25 | 4.00 | 3.85 |
| Dec. | 4.64 | 4.64 | 4.34 | 4.48 | 4.26 | 4.00 | 4.36 |

[fol. 1444]

## APPENDIX V

APPENDIX V

### LOWEST SWISS MISS APPLE PIE PRICES IN SEVEN MARKETS

(Prices are in Dozens)

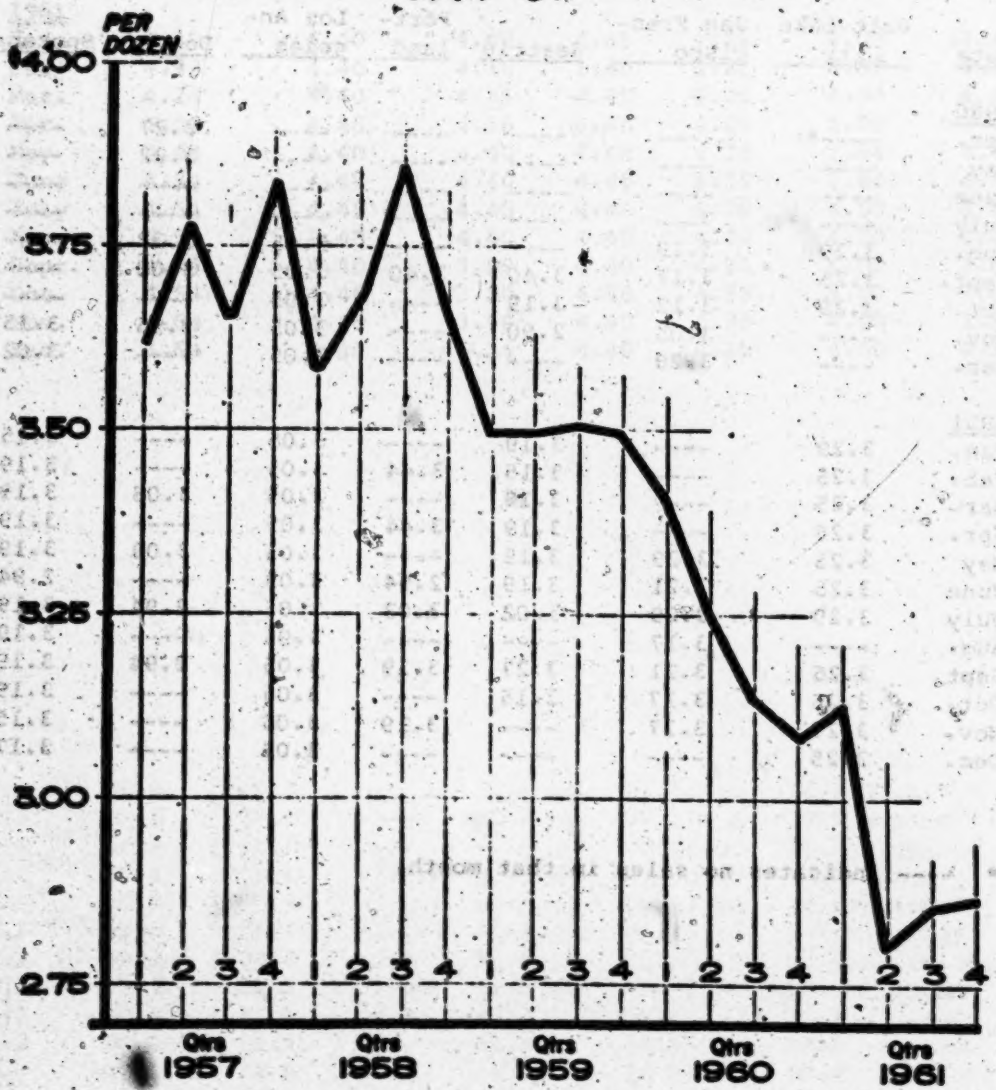
| Date | Salt Lake City | San Francisco | Seattle | Portland | Los Angeles | Denver | Spokane |
|---|---|---|---|---|---|---|---|
| 1960 | | | | | | | |
| Apr. | ----* | ---- | ---- | ---- | ---- | 3.27 | ---- |
| May | ---- | ---- | ---- | ---- | ---- | 3.22 | ---- |
| June | ---- | ---- | ---- | ---- | ---- | ---- | ---- |
| July | ---- | ---- | ---- | ---- | ---- | ---- | ---- |
| Aug. | 3.29 | 3.29 | ---- | ---- | 3.05 | 3.22 | ---- |
| Sept. | 3.25 | 3.17 | 3.40 | 3.40 | 3.05 | 3.08 | ---- |
| Oct. | 3.25 | 3.17 | 3.19 | ---- | 3.05 | ---- | ---- |
| Nov. | ---- | 3.05 | 2.90 | ---- | 3.05 | 2.96 | 3.15 |
| Dec. | ---- | 3.29 | ---- | ---- | 3.05 | ---- | 3.02 |
| 1961 | | | | | | | |
| Jan. | 3.29 | ---- | 3.19 | ---- | 3.05 | ---- | 3.15 |
| Feb. | 3.25 | ---- | 3.15 | 3.44 | 3.05 | ---- | 3.19 |
| Mar. | 3.25 | ---- | 3.19 | ---- | 3.05 | 3.08 | 3.19 |
| Apr. | 3.25 | ---- | 3.19 | 3.44 | 3.05 | ---- | 3.19 |
| May | 3.25 | 3.29 | 3.19 | ---- | 3.05 | 3.09 | 3.19 |
| June | 3.25 | 3.21 | 3.19 | 2.94 | 3.05 | ---- | 2.94 |
| July | 3.29 | 3.29 | 3.02 | 3.02 | 3.05 | 2.94 | 3.19 |
| Aug. | ---- | 3.17 | ---- | ---- | 3.05 | ---- | 3.19 |
| Sept. | 3.25 | 3.21 | 3.27 | 3.19 | 3.05 | 2.94 | 3.19 |
| Oct. | 3.25 | 3.17 | 3.15 | ---- | 3.05 | ---- | 3.19 |
| Nov. | 3.25 | 3.17 | ---- | 3.19 | 3.05 | ---- | 3.15 |
| Dec. | 3.25 | ---- | ---- | ---- | 3.05 | ---- | 3.17 |

* ---- indicates no sales in that month.

[fol. 1445]

APPENDIX VI

# AVERAGE COST OF MORTON APPLE PIES LAID DOWN IN SALT LAKE CITY 1957-61



[fol. 1446]

## APPENDIX VII
## APPENDIX III - continued

| Date | Utah Brand | Frost 'N' Flame |
|---|---|---|
| 1960 | | |
| Jan. | 3.50 | ---- |
| Feb. | 3.50 | ---- |
| Mar. | 3.50 | 3.00 |
| Apr. | 3.00 | 3.00 |
| May | 3.50 | 3.00 |
| June | 3.35 | 3.00 |
| July | 3.00 | 3.00 |
| Aug. | 3.50 | 3.00 |
| Sept. | 3.16 | 3.00 |
| Oct. | 3.50 | 3.10 |
| Nov. | 3.50 | 3.10 |
| Dec. | 3.50 | 3.10 |
| 1961 | | |
| Jan. | 3.43 | 3.10 |
| Feb. | 3.50 | 3.10 |
| Mar. | 3.10 | 3.10 |
| Apr. | 3.50 | 3.10 |
| May | 3.40 | 3.10 |
| June | 2.75 | 2.75 |
| July | 2.75 | 2.75 |
| Aug. | 2.75 | 2.75 |

[fol. 1447]

APPENDIX VII - continued

| Date | Carnation San Francisco | Carnation Spokane | Carnation Denver | Salt Lake City | Salt Lake City |
|---|---|---|---|---|---|
| 1959 | | | | | |
| Jan. | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| Feb. | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| Mar. | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| Apr. | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| May | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| June | 3.90 | 4.22 | 4.22 | 4.00 | X4.22 |
| July | 3.90 | 3.90 | 3.90 | 4.00 | 3.90 |
| Aug. | 3.90 | 3.90 | 3.90 | 3.60 | X3.90 |
| Sept. | 3.90 | 3.90 | 3.90 | 3.60 | X3.90 |
| Oct. | 3.50 | 3.90 | 3.90 | 3.50 | X3.90 |
| Nov. | 3.50 | 3.46 | 3.60 | 3.50 | X3.70 |
| Dec. | 3.40 | 3.46 | 3.60 | 3.60 | X3.70 |
| 1960 | | | | | |
| Jan. | 3.60 | 3.30 | 3.90 | 3.50 | X3.90 |
| Feb. | 3.50 | 3.30 | 3.30 | 3.50 | 3.30L |
| Mar. | 3.24 | 3.90 | 3.30 | 3.50 | 3.30L |
| Apr. | 3.48 | 3.90 | 3.30 | 3.00 | X3.48L |
| May | 3.60 | 3.90 | 3.30 | 3.50 | X3.84L |
| June | 3.42 | 3.90 | 3.35 | 3.35 | X3.84L |
| July | 3.42 | 3.65 | 3.60 | 3.00 | X4.02 |
| Aug. | 3.86 | 3.90 | 3.50 | 3.50 | X3.90 |
| Sept. | 3.86 | 3.90 | 3.50 | 3.16 | X3.90 |
| Oct. | 3.26 | 3.96 | 2.50 | 3.50 | X3.90L |
| Nov. | 3.26 | 3.96 | 3.10 | 3.50 | X3.86L |
| Dec. | 3.75 | 4.26 | 3.10 | 3.50 | X3.86L |
| 1961 | | | | | |
| Jan. | 3.96 | 4.35 | 3.06 | 3.43 | X3.46L |
| Feb. | 3.86 | 3.60 | 3.00 | 3.50 | 3.46L |
| Mar. | 3.75 | 3.60 | 3.00 | 3.10 | X3.46L |
| Apr. | 3.75 | 3.60 | 3.00 | 3.50 | 3.46L |
| May | 3.75 | 3.60 | 3.00 | 3.40 | X3.46L |
| June | 3.76 | 3.60 | 3.00 | 2.75 | X3.46L |
| July | 3.56 | 3.60 | 3.00 | 2.75 | X3.46L |
| Aug. | 3.11 | 3.60 | 3.80 | 2.75 | X3.46L |

[fol. 1448]

## APPENDIX VIII

**COMPARISON OF LOWEST FROST 'N' FLAME APPLE PIE SALE PRICES WITH LOWEST CARNATION APPLE PIE OFFERING PRICES, SALT LAKE CITY MARKET**

(Prices are in Dozens)

| Date | Frost 'N' Flame | Carnation |
|---|---|---|
| 1959 | | |
| Aug. | 3.70 | 3.90 |
| Sept. | 3.70 | 3.90 |
| Oct. | 3.70 | 3.90 |
| Nov. | ----* | 3.70 |
| Dec. | ---- | 3.70 |
| 1960 | | |
| Jan. | ---- | 3.90 |
| Feb. | ---- | 3.30 |
| Mar. | 3.00 | 3.30 |
| Apr. | 3.00 | 3.48 |
| May | 3.00 | 3.84 |
| June | 3.00 | 3.84 |
| July | 3.00 | 4.02 |
| Aug. | 3.00 | 3.90 |
| Sept. | 3.00 | 3.90 |
| Oct. | 3.10 | 3.90 |
| Nov. | 3.10 | 3.86 |
| Dec. | 3.10 | 3.86 |
| 1961 | | |
| Jan. | 3.10 | 3.46 |
| Feb. | 3.10 | 3.46 |
| Mar. | 3.10 | 3.46 |
| Apr. | 3.10 | 3.46 |
| May | 3.10 | 3.46 |
| June | 2.75 | 3.46 |
| July | 2.75 | 3.46 |
| Aug. | 2.75 | 3.46 |

* ---- indicates no sales in that month.

[fol. 1449]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JUDGMENT—May 25th, 1965

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the transcript of record from the United States District Court for the District of Utah and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment in favor of Utah Pie Company on its §2(a) claims is reversed and the causes are remanded with instructions to enter judgment for the defendants.

It is further ordered that the judgment n.o.v. in favor of Utah Pie Company on the counterclaim of Continental Baking Company is reversed and the cause remanded with instructions to grant Utah Pie Company a new trial on the counterclaim.

By order of June 28, 1965, the mandate of the United States Court of Appeals was stayed for a period of thirty days under provision of paragraph 3 of rule 28 of said court.

By order of August 2, 1965, the mandate of the United States Court of Appeals was stayed to August 23, 1965.

[fol. 1450] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1451]

SUPREME COURT OF THE UNITED STATES

No. 489—October Term, 1965

UTAH PIE COMPANY, Petitioner,

v.

CONTINENTAL BAKING COMPANY, et al.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. In addition to all the questions presented by the petition, counsel are requested to brief and discuss at oral argument the following questions:

"1. Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?

"2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 312; Globe Liquor Co. v. San Roman, 332 U.S. 571; and Weade v. Dichmann, Wright & Pugh, 337 U.S. 801?

[fol. 1452] "3. Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.